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WILCOX & CO

No. 7773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CITY OF COEUR D'ALENE, IDAHO, a municipal corporation; J. K. COE, Mayor; A. GRANTHAM, Treasurer; WILLIAM T. REED, Clerk; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN and C. C. HODGE, Members of the City Council of said City of Coeur d'Alene, Idaho, and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,

Appellants,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Northern Division

STPAWN & CO., INC., STATIONERS-PRINTERS, BOISE

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

CITY OF COEUR D'ALENE, IDAHO, a municipal corporation; J. K. COE, Mayor; A. GRANTHAM, Treasurer; WILLIAM T. REED, Clerk; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN and C. C. HODGE, Members of the City Council of said City of Coeur d'Alene, Idaho, and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,

Appellants,

vs.

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Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Northern Division

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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ROBERT H. ELDER,
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Attorneys for Appellee.

INDEX

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

THE WASHINGTON WATER POWER COMPANY, a corporation,

Plaintiff,

vs.

CITY OF COEUR D'ALENE, IDAHO, a municipal corporation; J. K. COE, Mayor; A. GRANTHAM, Treasurer; WILLIAM T. REED, Clerk; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN and C. C. HODGE, Members of the City Council of said City of Coeur d'Alene, Idaho, and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,

Defendants.

No. 1268

AMENDED BILL OF COMPLAINT

Filed December 6, 1934.

Plaintiff, the Washington Water Power Company, brings this its Amended Bill of Complaint against the defendants above named, and in behalf thereof respectfully shows:

I.

The plaintiff is now and at all of the times mentioned

zens, residents and inhabitants of the State of Idaho, in this complaint has been a corporation organized and existing under and by virtue of the laws of the State of Washington, and is now and at all of the times herein mentioned has been a citizen of the State of Washington, with its principal place of business at the City of Spokane, Washington, and is now and at all of the times herein mentioned has been authorized and empowered to do business in the State of Idaho and to acquire and hold property in said state by virtue of a full compliance with the laws of the State of Idaho relating to foreign corporations.

II.

The City of Coeur d'Alene, Idaho, is a municipal corporation created, organized and existing under and by virtue of the laws of the State of Idaho, a citizen of said state and a resident and inhabitant of the District of Idaho, Northern Division.

The defendant, J. K. Coe, is the duly elected, qualified and acting Mayor of the City of Coeur d'Alene, Idaho. The defendant A. Grantham, is the duly elected, qualified and acting Treasurer of said city. The defendant, William T. Reed, is the duly elected, qualified and acting City Clerk of said city. The defendants, Lee Stoddard, Otto Gladden, Frank LaFrenz, Joseph Loizel, O. M. Husted, Cassius Robinson, S. H. McEuen and C. C. Hodge, are the duly elected, qualified and acting members of the City Council of said city. All of the above named individual defendants are citi-

and of the District of Idaho, Northern Division.

III.

The defendant, Harold L. Ickes, is the appointed and acting Federal Emergency Administrator of Public Works, appointed under the provisions of Title II of the National Industrial Recovery Act.

That the said Harold L. Ickes is a citizen of the State of Illinois. He was not at the time of the commencement of this action, he has not been at any time since, and he is not now a citizen or resident of either the State of Idaho, or the State of Washington. That the said Harold L. Ickes as Federal Administrator of Public Works has consented to enter a general appearance herein if made a party defendant.

IV.

The jurisdiction of the United States District Court for the District of Idaho, over this suit is invoked and depends upon the ground that the suit is of a civil nature, arises under the Constitution of the United States, involves the construction and application of the Fifth Amendment and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and also involves the constitutionality of and the construction and interpretation of the National Industrial Recovery Act.

That the said suit is also one between citizens of different states as appears by the allegations of paragraphs I and II of this Amended Bill of Complaint,

and the value of the matter in dispute in this suit, exclusive of interest and costs, is in excess of $3000. The property rights and franchises of the plaintiff for the protection of which the plaintiff invokes the aid of this court, and the value of the right of the plaintiff to carry on its business free from the interference herein complained of, are of a value in excess of $10,000 all as is more specifically hereinafter set forth, and the funds, the borrowing and expenditure of which the plaintiff seeks to enjoin herein, amount to more than $100,000 as is hereinafter more specifically set forth.

V.

The Washington Water Power Company is authorized and empowered by its articles of incorporation to engage in the generation, distribution and sale of electric energy and power and to erect, construct, maintain and operate electric power plants and transmission lines for the development and use of water power, and to do all things necessary and incident thereto; to furnish electricity for lighting within cities in the State of Idaho; and to distribute and sell electric power and energy to the inhabitants thereof.

Plaintiff is now and at all of the times herein mentioned has been a public service corporation in the performance and discharge of said duties within the State of Idaho.

Plaintiff for many years last past has been and now is the owner of a hydroelectric power plant and dams situated in the Spokane River at Post Falls, Idaho,

about ten miles distant from the City of Coeur d'Alene, and also at all of said times and for many years last past has been the owner of several hydroelectric plants situated on the Spokane River in the State of Washington.

Said power plants are connected by transmission lines for the purpose of affording continuity of service to the many customers of plaintiff and users of power in northern Idaho and eastern Washington. Plaintiff furnishes electric power for practically all uses in the northern counties of the State of Idaho, and particularly in the County of Kootenai, in said state. The power transmission lines of plaintiff extend into the County of Kootenai, Shoshone, Bonner, Latah, Nez Perce, Benewah, Clearwater, Idaho and Lewis in said State of Idaho. Plaintiff has been the owner of some of said hydroelectric power plants and transmission lines for more than twenty-five years and has acquired others within the last ten years.

Plaintiff has ample power, capacity and facilities to serve all persons and uses now existing or reasonably to be anticipated for many years in the said Counties of Northern Idaho.

The plants, transmission lines and facilities of the plaintiff had been designed and constructed to render electrical services to the above territory. Plaintiff has been authorized by the State of Idaho, either by general laws or by authority of the Public Utilities Commission of the State of Idaho, to construct, own, operate and maintain said plants, facilities and lines.

Its properties, electric power plants, transmission lines and other facilities are modern and efficient, and it has at all times been equipped to and does render a superior, completely adequate and sufficient electric utility service in the district covered by its lines in Idaho.

Plaintiff further alleges that it has acquired electric light and power distribution systems in various cities and villages of northern Idaho and in each of said cities and/or villages it renders electric light and power service to the inhabitants of said cities and to the district and territory adjacent to said municipalities.

By reason of its operation of central stations equipped with generating units and the location of its transmission lines extending from said central stations, it has been enabled to supply electric energy throughout said area to municipalities which would have been unable otherwise to secure adequate electrical service.

Plaintiff has expended in the construction, acquisition and improvement of its said electrical facilities in the State of Idaho, more than the sum of $5,000,000.

Plaintiff has issued and outstanding, bonds, debentures, preferred stock and common stock. A substantial portion of its bonds and preferred stock have been sold to consumers, employees and other citizens and investors residing in the territory in which it operates. More than 200 citizens of the City of Coeur d'Alene alone are the owners of the preferred stock of the plaintiff and many other citizens of Idaho hold shares of said preferred stock and the bonds of this plaintiff.

The decrease of revenues experienced by plaintiff during the years of the depression, the increase of taxes, state and Federal, and the increased operating expenses have reduced its net earnings very substantially.

VI.

By an ordinance approved October 19, 1903, being ordinance No. 94, the Chairman and Board of Trustees of the Village of Coeur d'Alene, Idaho, the predecessor of the defendant City of Coeur d'Alene, granted to Consumers Company, a corporation of Idaho, a franchise for furnishing to the inhabitants of the Village of Coeur d'Alene, Idaho, electricity for lighting and other purposes for a period of fifty years from the date thereof, and the plaintiff has become and now is the owner of the franchise granted by said ordinance, and it and its predecessor in interest have rendered electrical services to the City of Coeur d'Alene and the Village of Coeur d'Alene under said ordinance for more than thirty years. A copy of said ordinance is attached hereto, marked Exhibit "B" and made a part hereof.

VII.

In the year 1930, plaintiff purchased the electric power and light distribution system of the City of Coeur d'Alene, and has since owned, maintained and operated the same. Since acquiring the said distribution system, plaintiff has expended a very substantial sum of money, to-wit, more than the sum of $33,000 in improving and reconstructing said system and improving the facilities

thereof, and the sum of $27,000 for installation of new transformers to insure continuity of service by providing two independent connections through which to secure power, and during the same time has reduced the rates in said city for the use of electric light and power.

Plaintiff further alleges that all of its rates charged for electric light services rendered in the State of Idaho are subject to regulation and control by the Public Utilities Commission of said state. While a predecessor in interest of plaintiff owned said Coeur d'Alene light and power plant and distribution system, and in the year 1922, the rates charged for electrical services in Coeur d'Alene, were fixed by the Public Utilities Commission of Idaho after a hearing as to the value of the plant, depreciation, cost of operation, volume of business, earnings and other matters. Said rates for light and power in the City of Coeur d'Alene so fixed have remained the same except with the approval of the Public Utilities Commission of the State of Idaho, plaintiff has made and put into effect four reductions in different rate schedules which rate reductions aggregate $11,400 annually.

The City of Coeur d'Alene has a population according to the Federal census of 1930 of 8297. Plaintiff furnishes electric service to all classes of customers in said city, who number 2377, and furnishes electric services to approximately 332 additional customers residing in territory adjacent to said city. Plaintiff supplies all of the electric light and power sold and distributed in said City of Coeur d'Alene.

Plaintiff has an investment in the distribution system located in the City of Coeur d'Alene, and its environs, exclusive of generating and transmission equipment, of more than $200,000. Electric service has been rendered the City of Coeur d'Alene, by plaintiff and its predecessors in interest for more than thirty years, and plaintiff now possesses lawful and valid operating rights for the conducting of its electric business in said city.

Plaintiff is a taxpayer of the United States, of the State of Idaho, of the County of Kootenai, of the City of Coeur d'Alene, and of other taxing districts in the State of Idaho, and is the owner of extensive properties subject to taxation by said taxing authorities. For the year 1934, as nearly as can be estimated, the income taxes, capital stock taxes and energy taxes the plaintiff paid to the United States aggregated a sum in excess of $266,000 and plaintiff has paid or is accruing for payment said amount of money.

Taxes in the State of Idaho paid by this plaintiff for the year 1933 upon its electric generating, transmission and distribution systems amounted to the sum of $214,-815.62, of which said sum there was paid to the County of Kootenai, for state, county and municipal taxes within said county the sum of $66,547.94, and in addition thereto, plaintiff paid to irrigation districts of said Kootenai County and adjacent and tributary to said City of Coeur d'Alene the sum of $10,855.74 in lieu of taxes which it would otherwise have been required to pay to the state and its subdivisions a total of $77,403.-68. The sum of $10,855.74 represents the amount of

taxes upon the property of plaintiff used for generating and delivering electric power to the extent such property is used for furnishing power for pumping water for irrigation or drainage purposes in Kootenai County. The exemption accrues under the laws of Idaho to the benefit of the consumers of such water power and the amount so required to be paid by this plaintiff out of its total taxes is fixed by the State Board of Equalization of said state. In this connection, plaintiff alleges that the gross electric revenue received from customers in the County of Kootenai for the year 1933 amounted only to $148,333.16, more than one-half of its total gross revenue being repaid in state, county and other municipal taxes and in payments to said irrigation customers. In addition thereto, the plaintiff paid to the State of Idaho on account of power generation in said county a considerable sum of money under what is known as the "Kilowatt Hour Tax." All of the property of the plaintiff in said City of Coeur d'Alene is subject to said State, county, city, school and other municipal taxes.

VIII.

The City Council of the City of Coeur d'Alene, on or about the 2nd day of November, 1933, enacted and on the same day the Mayor approved an ordinance, being Ordinance No. 713, calling an election for the purpose of submitting to the voters of the city a proposition for incurring an indebtedness of $300,000 by the issuance of municipal bonds of said city in said principal amount

for the purpose of paying the cost and expenses of the acquisition by purchase or by construction of a light and power plant and distribution system for said city, a copy of said ordinance being attached hereto, marked Exhibit "A" and made a part hereof.

At or about said time the City Council of the City of Coeur d'Alene, as aforesaid, adopted said ordinance 713, providing for the incurring of a municipal indebtedness of $300,000 for the purpose of paying the costs and expenses of the acquisition by purchase or construction of an electric power plant and lighting system, and said City Council of said city also passed an ordinance providing for the incurring by the City of Coeur d'Alene of a municipal indebtedness of $300,000 by issuance of municipal bonds of said city for the purpose of paying the costs and expenses of the acquisition by purchase or construction of a water works system by said city. An election was provided for in each of said ordinances and was called and held on the same day, to-wit: December 12, 1933, submitting for approval of the voters the proposition of incurring a municipal indebtedness of $300,000 for each of said systems, and the issuance of municipal bonds in such sums for each thereof, and said election resulted in the approval of both propositions by more than two-thirds of the voters voting at said election.

Reference is made to the ordinance for the acquisition of a water system for the reason that in the application of the City of Coeur d'Alene to the Federal Emergency Administration of Public Works, hereafter referred to,

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Reference is made to the ordinance for the acquisition of a water system for the reason that in the application of the City of Coeur d'Alene to the Federal Emergency Administration of Public Works, hereafter referred to,

IX.

request was made for funds for both systems.

At a special meeting of the City Council of the City of Coeur d'Alene, held at 5 o'clock P. M., on December 14, 1933, it was declared by a motion that the said bond election had carried by the necessary two-thirds majority and thereupon the said city council adopted a motion that the mayor, city clerk, city attorney and city engineer be authorized to prepare an application to be made to the Federal Emergency Administration of Public Works for funds to construct a water works system and light and power plant in the City of Coeur d'Alene.

Pursuant to said action, the defendants, the mayor and the city clerk, together with the other officers designated by said motion adopted by the City Council, on the same day, December 14, 1933, executed and shortly thereafter filed with the Federal Emergency Administration of Public Works an application wherein a loan was requested of $650,000 and a net loan of $475,000 which in said application is alleged to exclude a 30% grant or gift for the cost of labor and materials to be used in the construction of said electric generating plant, distribution and street lighting system and said water system.

In said application, it appears that a report had been made by an engineer employed by the said City of Coeur d'Alene and which report contained plans for the construction of said two systems. In said application, however, it is stated that the total cost of the power plant, electric distribution system and street lighting

system is estimated to be $337,580.00 which is in excess of the amount of indebtedness authorized to be incurred for the purposes mentioned in Ordinance 713 as aforesaid, and the election held under said ordinance. Of said sum of $337,580 the total cost of labor and materials is estimated at $276,512.91 and the contractor's profit thereon at $27,578.09, a total of $304,091.00 and the other costs and expenses of said construction are estimated to be $33,480.00.

The amount estimated by said engineer to be expended for labor in the construction of the Diesel engine generating plant is the sum of $10,225.00 and of the distribution system, $19,115.25. Another item given is plant wiring and equipment, $332.50, a total of $29,672.75. On the building to be used to house the Diesel power plant and the pumps for the water system, the labor is estimated at the sum of $6900. Both the said report of the engineer and said application set forth that the cost of the complete municipal electric power and light system would be in excess of the sum authorized to be expended by the said Ordinance No. 713.

X.

Plaintiff promptly filed a protest with the State Advisory Board of the Federal Administration of Public Works against the approval of said application and the granting, giving and loaning of said funds, setting forth therein detail the reasons why said application should not be approved and said gift, grant and loan should not be made.

XI.

Plaintiff is informed and believes and upon such information and belief alleges the Federal Emergency Administration of Public Works at Washington, D. C., has approved the aforesaid application of the defendant city, and will shortly advance funds to the city in the amount of $337,580.00 for the purpose of constructing an electric power plant and power distribution system. Of said sum, part is to be a loan to the city and part is designated as a gift or grant, the exact amounts of each thereof being unknown to plaintiff. In the application the city asks a gift or grant amounting to 30% of the total cost of labor and materials, plus contractor's profit, which would amount to $91,230. The defendant city will undertake to issue and pledge its general obligation bonds as security for the amount of the loan and will undertake the construction of a municipal power and generating plant and electric distribution system by the application of the proceeds of the loan and of the said gift or grant.

Plaintiff is informed and believes and upon said information and belief alleges that said city and the defendants as its officers propose and threaten to enter into a contract with said Federal Emergency Administration of Public Works by the terms of which said contract the said city will undertake and agree to construct a Diesel Engine electric power plant and power distribution system costing at least the sum of $337,580.

The acts of the defendants constitute the incurring of an indebtedness and/or creation of a liability exceeding the annual income and revenue of the City of Coeur d'Alene for that year without the assent of two-thirds of the qualified voters, voting at an election held for that purpose and without provision being made for the collection of an annual tax sufficient to pay the interest on such indebtedness and/or liability as it falls due and to constitute a sinking fund for the payment of the principle thereof as provided in Section 3 of Article VIII of the Idaho Constitution.

XII.

All matters relating to the government, franchises and business of the defendant city are managed and conducted by the mayor and city council of said city. The aforesaid officials have had no experience in the construction and operation of electric utilities and have had no sufficient information or knowledge of the costs, methods and plans of construction and operation of electric generating plants and distributing systems to enable them to exercise ordinary prudent judgment and discretion concerning such business.

Under the laws of the State of Idaho, the Public Utilities Commission of the state has power to regulate and supervise the rates and services of the plaintiff in supplying power and light. Under the laws of Idaho, the mayor and city council of the defendant city would have the exclusive power of regulation of the rates and supervision of the service of any municipally owned

utility and the Public Utilities Commission of the State of Idaho has no powers of regulation or supervision over such municipal utilities.

XIII.

Prior to the election held to ratify or reject the proposed bond issue, one Franklin P. Wood, an engineer from Denver, Colorado, was employed by the defendants to make a report to the city, outlining a plan and reporting as to the feasibility, desirability and cost of building a municipal light and power system by the city. Such report was made and purports to show the cost of a complete generating plant and distribution system for the said city, the revenues, gross and net, which the city would receive therefrom, and the cost of operation and other expenses thereof.

On or about the 21st day of November, 1933, the said report was released and publicity given in the press, and otherwise, to the contents thereof. The defendant officers conducted a campaign in which the citizens of the city were urged to vote in favor of authorizing the construction of a municipal light and power plant and to pay therefor, and in which statements of said Wood were given publicity and advertisement, and in addition thereto, a public meeting was held at which said Wood appeared and spoke in favor of said project.

The report of said Wood and the facts and figures set forth therein are grossly erroneous in a large number of conclusions and estimates, and are not in accordance with the apparent and easily ascertained facts relating

to conditions affecting the construction and operation of such proposed municipal plant.

In the following particulars, the said engineer's report is erroneous and based upon mistaken and erroneous conclusions and inaccurate in statement of facts:

(1) In the report furnished by said engineer, Franklin P. Wood, previous to said election, it was stated as follows:

> "In conclusion attention should be drawn to the fact many times pointed out before, that the city and people of Coeur d'Alene are paying for the water and light systems now, but not getting them. Even though it might be possible to only get a part of the business now there is no question but that the bonds will be paid out without the people being assessed anything in the way of taxes to pay therefor."

Said statement from said report signed by said Wood was published in the Coeur d'Alene Press, a daily newspaper published at Coeur d'Alene, on November 21, 1933, and in the Kootenai County Leader, a weekly newspaper published at Coeur d'Alene, Idaho, in its issue of November 21, 1933. Said Kootenai County Leader is owned and published by the defendant mayor, J. K. Coe.

(2) Said report assumed and stated that inasmuch as 80% of the people had signified their willingness to buy service from a city-owned system the figures to be

used by the engineer could be computed upon the assumption that 80% of the gross business in Coeur d'Alene could be obtained by the municipal plant. It assumed that the gross revenues from electricity in the city amount to $120,000 and that the city would receive 80% thereof, which would be $96,000. In said report it was assumed that 2,500,000 kilowatt hours per annum would be required for electrical service and 1,110,000 kilowatt hours per annum for pumping water. The assumption that because 80% in number of the electric users in the City of Coeur d'Alene had agreed, if they did agree, to purchase their electric service from the municipal plant, involves a further concealed assumption that said 80% represented 80% of the gross consumption.

Plaintiff has no list of said contracts, but is informed and believes and therefore alleges the fact to be that in amount of consumption, the same do not represent 40% of the electric energy used by consumers in the City of Coeur d'Alene. Plaintiff alleges that said alleged contracts are void and of no effect. Said alleged contracts were all signed at a time when said defendant city was endeavoring to execute a scheme to build a plant from the sale of bonds which were to be a lien upon the revenues of the plant and not general obligation bonds of the city.

The inaccuracy of said assumptions and facts is further disclosed by the report of said Wood attached to the application of the city to the Federal Emergency Administration of Public Works. In the report made

in December, 1933, something over a month after the previous report, the said engineer assumes (based upon the same 80% of the gross consumption being purchased from the municipal plant) a consumption of electric current by revenue producing customers within the city of 3,000,000 kilowatt hours per annum, at 3c per kilowatt hour, a total of $90,000 which said 3,000,000 kilowatt hours included the water pumping for the proposed municipal water system. In the said application, it is further stated in the estimate of future operating results for the municipal electric system there would be 2600 customers in the year 1935. The actual number of customers which the plaintiff has in Coeur d'Alene is 2377, which is as many customers as the plaintiff has ever had in said city.

The said Wood in his report, which was attached to the said application to the Federal Emergency Administration of Public Works, estimated that the amount to be paid for the pumping of water would be $12,800 per annum, and the electric power required 750,000 kilowatt hours per annum, which amounts to 1.7c per kilowatt hour (given in said report at 1.6c). This would leave for sale to consumers within the city 2,250,000 kilowatt hours per annum, which would be required to produce the balance of the revenue estimated of $90,000 or $77,200 per annum, an average cost to the consumer of 3.43c per kilowatt hour. The plaintiff now receives in Coeur d'Alene, an average of 3.33c per kilowatt hour, exclusive of power used for water pumping.

(3) In the report made in November, 1933, prior

to the election, by the said Wood, it is asserted that except for the interest charges, electricity could be furnished to the ordinary household for 1.5c per kilowatt hour. In the report prepared by the same Wood in December, attached to the application of the city to the Federal Emergency Administration of Public Works, the said Wood stated that without considering allowances for interest and depreciation, the average cost per kilowatt hour of current to be distributed would be approximately 1.6c per kilowatt hour, stating that the actual operating costs, including everything but interest and depreciation, is $47,000 for the power plant and distribution system, including the labor operation of the water system pumps.

(4) The report discloses that two sections of the city were omitted from any distribution service and the voters were not advised of that fact. In fact, the report apparently did provide for service throughout the City of Coeur d'Alene. That two sections of the city were omitted, is shown by the engineer's report attached to the application of the city to the Federal Emergency Administration of Public Works.

XIV.

In the Kootenai County Leader, above referred to, the newspaper owned and published by the defendant mayor, in its issue of December 8, 1933, just prior to said election, appeared a letter signed by the defendant, S. H. McEuen, as Chairman of the Fire, Light and Water Committee of the City of Coeur d'Alene. In

said communication, the said defendant McEuen referred to the investigations of the engineer, and stated that the cost of the entire new water, light and power generating and distribution systems would be completely covered by the sum of $600,000; that the city intended to bring out street lighting better than it has had in the past; to connect all porch lights on the city side of the meter so that each resident can have a porch light all night, and retain the present street lighting system and improve the same. The said McEuen also stated that the city proposed to have a much larger and better designed electric distribution system with a higher voltage on the primary side of the transformers, this will mean hotter electricity for home use. Said McEuen also stated in said article that the city council had data which proved beyond a doubt that a municipal plant in Coeur d'Alene would pay its own way and it would not be necessary to raise one penny of taxes on property to pay off any portion of said bonds. The said statements were designed by the said McEuen to mislead the voters and users of such electricity, when as a matter of fact, the said McEuen knew, or by the exercise of reasonable care and investigation could have ascertained that such statements were untrue and inaccurate.

XV.

All of the erroneous asumptions, statements and representations in the said engineering report of said Wood were either known by said Wood to be contrary to the facts, or could have been so known to him by making

reasonable investigation. All of such assumptions, statements and representations were announced and advertised by various methods of propaganda furnished to the voters of the defendant city by the defendants, the Mayor, City Council and the City Clerk, in a campaign conducted by said officers for approval of said bond issue. The erroneous and misleading report of the said Wood and the announcements and advertisements of the defendants were designed to and actually were representations to the voters of the said city that the sum of $300,000 would be sufficient to construct and equip said plant and distribution system and would impose no tax liability, in excess thereof, upon the taxpayers of the city, and as a matter of fact, said representations were to the effect that there would be no tax liability of any kind upon the taxpayers of the city because the rates of the said municipal plant would itself pay for the said plant, the interest upon the bonds, and leave a surplus in the city treasury.

Plaintiff states that such statements and representations were false and untrue, and when published and advertised were known by the said Wood and by the defendant mayor and members of the city council to be false and untrue, or could have been known to be false and untrue by any reasonable investigation or examination of the facts. That such misleading and erroneous statements and representations were made for the particular purpose of deceiving the voters of said city and to mislead them into consenting to the creation of the

bonded indebtedness of $300,000 and the said misleading and erroneous statements did deceive the voters of said city and did cause them to consent to such bonded indebtedness, believing that they would not be obligated to pay such bond and interest, or any part thereof by taxing the property in said city.

Plaintiff further states that the concealment by the said defendants of their intention not to supply two sections of the city were made for the purpose of deceiving the citizens residing there and inducing them to vote for said bonds and said concealment, as plaintiff is informed and believes and therefore alleges, did deceive the voters in said districts in that respect and caused them to consent to the said indebtedness, believing that they would be supplied, and that such concealment was intentional on the part of the said defendants.

XVI.

The properties and business of the plaintiff will suffer irreparable injury, disruption and damage if it should lose the electric utility business in Coeur d'Alene, Idaho, through the illegal and wrongful acts of the defendants. If the municipal power plant and distribution system is erected, plaintiff will be compelled either to enter into competition and suffer substantial losses in its operations in said city or to abandon entirely its properties and system in said city. If the system should be abandoned, the employees now working for the plaintiff in Coeur d'Alene would necessarily be discharged and a number of other employees engaged by

plaintiff in the maintenance of its transmission lines, the operation of power plants, meter reading and revenue collections, in accounting service and in supervision, would have to be reduced.

The business of plaintiff consists in serving various and divers users in relatively large towns, in smaller villages and communities, in rural districts, in electric service to farms, in pumping water for irrigation, in industrial service and in the operation of mines, mills and smelters. Each class of business lend substantial aid to the plaintiff's ability to carry on the others, and each class is incapable of withdrawal without substantial impairment of plaintiff's ability to serve the others. In this behalf, plaintiff particularly calls attention to the fact that it is now serving a large number of users of electric light and power at their homes and places of business on small tracts adjacent to the City of Coeur d'Alene, and that it will be compelled to continue such service to these users as a public service corporation, and yet the plaintiff can only do this at a great loss and inconvenience and probably a substantial increase in cost to said users, whereas, the defendant city has no authority to engage in the sale of electricity outside the limits of said city, except that the said municipality has the right to sell surplus power outside the city. Plaintiff is advised by counsel and upon such advice and belief alleges that the said defendant city has no power under the law to engage in generating surplus electricity in said city for distribution and sale outside of said city.

XVII.

The plan of the defendant city if consummated with the aid of a gift and loan from the Federal Government, will result in certain and irreparable loss to plaintiff, to its stockholders and bondholders and to its employees, and will result in unemployment of the employees now engaged in its service. Such plan is unsound from an engineering, an economic and a social standpoint. Its sanction, promotion and attempted consummation by public officials is an unlawful abuse of discretion and maladministration of the powers and privileges granted by the National Industrial Recovery Act, and a perversion of the declared purposes and policies of said act.

XVIII.

The application of the defendant city to the Federal Emergency Administration of Public Works had attached to it an engineering report and investigation prepared by the said Franklin P. Wood, of Denver. The said application and the said engineering report were erroneous in many respects.

(1) It is assumed and stated in said report that the cost of the equipment for an adequate and reliable Diesel electric generating plant would not exceed $152,955.73, exclusive of overhead, contractor's profit and the building to house said plant. Said sum of $152,955.73 is inadequate to furnish an adequate Diesel Engine generating plant to supply 80% of the electric light and power load, including 80% of the pumping

load in the City of Coeur d'Alene. To supply 80% of said load, would require the expenditure for Diesel generating plant, exclusive of overhead, contractor's profit and building, the sum of $181,900. The report is unreliable in estimating in one place a load of 80% and in another place a total customer list of 2600 which is in excess of the number of customers of plaintiff in said city at this time, and more than plaintiff has ever had within said city. If a Diesel power plant adequate to serve 2600 customers in said city or to supply the entire city were installed, it would require four Diesel units instead of three and an expense of not less than $230,000 exclusive of overhead, contractor's profit and building to house the same.

(2) It is assumed and stated in said report that an adequate electric distribution system could be built for the service of said city for $102,632.18, exclusive of contractor's profit and overhead.

The report fails to provide for service to two sections of the city, the cost of which is estimated at $16,000. Said sections are described as follows:

(a) The Northwest part of the city, lying west of Government Way and 17th street and north of Linden Avenue;

(b) The northeast part of the city lying between Fifteenth street and Seventeenth street and north of Garden Avenue.

Within the above two districts so omitted and for which service is not provided in the plan, the plaintiff is now serving 155 customers. In addition to the above

two districts, there are other small disconnected areas in said city for which service is not provided in the plan of the city and of the engineer, attached to the said application, and plaintiff is now serving 25 customers therein.

A distribution system of the type proposed in the engineer's report for the city could not be constructed for less than $147,039.00 exclusive of contractor's profit and overhead. A distribution system supplying 80% of the consumers of said city could not be built for less than the sum of $136,588.00 exclusive of contractor's profit and overhead. Taking the contractor's profit, overhead and expenses set up in the report of said engineer Wood, together with a Diesel plant of three units, and with a distribution system providing for service to 80% of the consumers, the cost would exceed the sum of $400,000. An adequate Diesel generating plant for service of the entire city, consisting of four units and a distribution system for the entire city would cost more than the sum of $450,000.

The estimate of cost in said report is not adequate to pay for the necessary and proper equipment for a complete plant. Indicative of the inadequacies of the plan is the proposal to install two 1500-gallon storage tanks which would contain but four days' supply of fuel oil and would not be sufficient into which to unload a railroad tank car.

(3) The estimate of expense of generation assumed and stated in said report is unreasonably low and below

the actual cost necessary to be incurred in the following particulars:

(a) The amount of fuel oil is computed in said report on the basis of guaranteed efficiency of the engines, and not on expected efficiency. The guaranteed efficiency is that efficiency which is obtained by test runs when the machines are new. The expected efficiency is the efficiency which may be expected from the machines over a period of years. The cost of fuel oil is estimated and assumed to be 6c per gallon, whereas, the present cost is 6.91c per gallon.

(b) No adequate provision is made to take care of and supply free porch lights, which is estimated to require 250,000 kilowatt hours per annum.

(4) The report fails to take into proper consideration contingencies of competition, possibilities of higher oil costs, possibility of fire, accidents, injuries and other similar liabilities, and fails to make proper allowance for maintenance and adequate lubricating oil.

(5) The entire report of said Wood, together with the data furnished by him was further confusing, misleading, erroneous and untrue in the following particulars:

In the engineer's report made public prior to the said election, the said Wood stated that it is assumed in his figures that the city would start out with approximately 80% of the business and build it up gradually until it had all of the load. And further stated that the figures

were based on the assumption that 80% of the gross business would go to the city from the start.

In the report of the engineer attached to the application to the Federal Emergency Administration of Public Works, it is stated that in calculating costs it is assumed that the plants were supplying a 100% customer load and for estimated revenues, approximately 75% of the customer load. Any figures based upon a 100% customer load would require, instead of three Diesel units, four of said units of the same rating as proposed by the engineer in order to give reliable and adequate service. Notwithstanding the statement in said application that the operating costs assumed were based upon a 100% customer load, in the operating cost of the power plant, as shown in the report of said Wood attached to the said application, the fuel consumption is based upon 3,500,000 kilowatt hours. The plant maintenance is based upon the same customer load.

The statement in the application to the Federal Emergency Administration of Public Works that in calculating the operating cost it is assumed that the plant is supplying a 100% customer load, is untrue and misleading for the reason that the said figures are based upon the 75% customer load as shown by the estimated operating cost of the power plant in said engineer's report.

XIX.

Plaintiff further alleges that to carry out the said plan and to effectively serve the whole City of Coeur

d'Alene with electric power and light will require an outlay of more than $450,000 and that if the defendant mayor and members of the city council and other officers are permitted to proceed with said plan and permitted to receive from the Federal Government a gift and loan, they will expend the same so far as it will go and when the money is spent, said plant will be uncompleted and inadequate to serve the said city.

XX.

Plaintiff alleges that it is informed and believes and upon such information and belief charges that it is the purpose of the defendants first to construct a plant calculated primarily to serve the business section and the more populous sections of the city, and that it will be unable to extend service throughout the entire city with the funds which it now proposes to borrow from and receive as a gift from the Federal Government, which will leave to the plaintiff the sparsely populated sections of the city wherein the business is unprofitable and where the plaintiff, if it continued to do business in the city, would be unable to serve at reasonable rates without loss to the plaintiff.

Plaintiff further alleges that it furnishes electric power to various irrigation districts and farming areas in Kootenai County and in the vicinity of Coeur d'Alene, and the loss of the business in the City of Coeur d'Alene would seriously impair the plaintiff's ability to continue to serve said uses at the existing rates therefor. That the said city does not pretend that it would under-

take to serve said uses, and as has been hereinbefore set forth, it has no power to serve such uses.

XXI.

In the application of the defendant for such loan and gift, it is not alleged how many men will be employed directly on the work of constructing the electric light and power system, but it is alleged that in the construction of such system and the water system, which is referred to in Ordinance No. 714 hereinbefore referred to, that 160 men will be employed for a period of six months. The total amount, however, to be paid out for labor in said construction amounts to a sum but slightly in excess of $29,000 exclusive of the labor estimated for the power house and pumping plant.

Such application states that after the plant is in operation it will afford employment to more labor than is now employed in service. In the engineer's report, it is alleged that the labor cost of operation will include five men as well as one clerk. In the same report, it is stated that for the operation of the water system allowance should be made for three men, and for clerical help and office supplies, aggregating $2,000 and attention is called to the fact that the clerical and office work could be combined with that of the power plant at considerable saving.

Actually at the present time the plaintiff has employed in the electric light and water service in said city twenty-four employees. Therefore, instead of giving added employment, there will be a reduction in em-

ployment. Under the plan of defendants, not only will the number of employees be reduced, but all of the plaintiff's employees or a large number thereof will be required to be discharged. The labor that will be required under the city's proposal is inconsequential in comparison with the cost of materials.

XXII.

In its release No. 989, dated September 27, 1934, the Federal Emergency Administration of Public Works declared as follows the purposes, policy and practices which it has adopted with respect to applications of municipalities for loans and grants to finance municipal systems:

> "Achievement in certain instances of the administration purpose of making electric energy more widely available at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration.
>
> Municipal or local publicly owner power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.
>
> The statement of Administrator Ickes followed action by some privately owned utilities, which on reexamination of their condition, found it possible

to reduce rates to a point below those proposed by municipal project plants.

In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of the public works program.

In the cases affected Public Works Administration policy will be so administered that municipal plant construction will not be deprived of the possibility of public works support until such time as the local Government feels assured the proposed rate reduction by the existing utility will be in effect on a reasonably permanent basis.

Since the public works program began financing electric plants, where they are socially desirable and where they will be self-liquidating, there have been reductions of rates by private utilities in different localities. The private utilities are becoming increasingly cognizant of the greater use of power resulting from lower rates.

Administrator Ickes said:

'PWA has endeavored to make electric energy more broadly available to cheaper rates by acting on applications of municipalities for loans and

grants to finance municipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

'However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation.

'Furthermore, in the described situation Public Works will be free to use its funds to better advantage elsewhere. The action of the utility companies referred to supports the belief that domestic rates, in certain instances at least, are so high as to be disadvantageous to the company as well as unjust to the consumers. Experience shows that lower rates may produce larger profits, particularly where promotional campaigns are conducted and

the cost of electrical appliances is made reasonable.

'PWA will cooperate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect.

'State laws authorize municipal competition, hence it is PWA's position that the State has determined that such competition may be socially desirable. We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities. It is our policy to consider such applications particularly where franchises are soon to expire, provided the project is self-liquidating at rates lower than those which the existing utility is willing to put into effect.' "

The loan and grant for which application has been made to the Federal Emergency Administration of Public Works by the said City of Coeur d'Alene could not have been approved by the said Federal Emergency Administration of Public Works upon the theory that it is to be made "with a view to increasing employment quickly," for the foregoing release states that the purpose of the Public Works Administration in acting favorably on applications of municipalities for loans and grants to finance municipal systems is to make electricity more broadly available at cheaper rates. One of the policies announced in said release, to-wit, that the Public Works Administration will make it a practice

before approving any such municipal loan to give the public utility company an opportunity to put into effect rates at least as low as those at which the municipal system will be self-liquidating, has not been given effect with respect to said application of the City of Coeur d'Alene, obviously because the City of Coeur d'Alene did not contemplate at the time its application for said loan and grant was made putting into effect in said City of Coeur d'Alene rates for electric service lower than those now being charged in said City of Coeur d'Alene by the plaintiff.

Plaintiff alleges that the said City of Coeur d'Alene cannot construct a Diesel engine electric generating plant and distribution system for said city as proposed in its application and reduce rates below the rates now charged by plaintiff and make the same self-liquidating.

Plaintiff alleges that on November 7, 1934, Frank T. Post, president of plaintiff, sent a telegram to Hon. Harold L. Ickes, Public Works Administrator, in words and figures as follows:

Spokane, Washington
November 7, 1934

"Hon. Harold L. Ickes
Public Works Administrator
Washington, D. C.

Congressman White of Idaho has recently stated publicly that Public Works Administration has ap-

proved application City Coeur d'Alene Idaho for loan and grant to be used for construction Diesel engine Electric generating plant and distribution system in competition with our efficient hydro system stop Feel sure this application has not been called to your attention because its approval would violate statement of principles contained in Public Works Administration press release number nine eighty nine dated September twenty seventh nineteen thirty four stop Our present rates in Coeur d'Alene are among the lowest in the United States and regulated by Idaho Public Utilities Commission Stop Application of the City of Coeur d'Alene for loan and grant which we had an opportunity to answer does not contain any schedule of rates which city proposes to put in force if PWA shall loan and give it money with which to build a system to operate in competition with our company therein stop We have never seen any schedule of rates proposed by the city and it is impossible for the city to make this proposed project self-liquidating under schedules of rates lower than ours Stop Construction of Diesel engine plant in Coeur d'Alene at this time would seem to violate all the principles contained in your press release and in other releases of the PWA not only because of the situation outlined above but also because there is at the present time in this territory a large surplus of hydro generated electrical energy which will be greatly augmented by the Government through the Grand Coulee de-

velopment Stop Feel sure you have no intention to depart from previously announced policies and that Coeur d'Alene application will not be granted Stop Shall greatly appreciate assurance that this situation will be given your personal attention and I will esteem it a privilege to have the opportunity of a personal interview and discussion of whole problem with you.

F. T. Post, President
The Washington Water Power Company

In reply thereto, Mr. Ickes sent the following telegram:

"Postal Telegraph

C 47 58 GOVT WASHINGTON DC NOVEMBER 12
F T POST
PRESIDENT THE WASHINGTON WATER POWER CO SPOKANE WASH RETEL SEVENTH DOCKET 6695 COEUR DALENE CITYS PROPOSED ELECTRIC RATES CONTEMPLATE TWENTY PERCENT REDUCTION STOP PROPOSED WATER DEEMED BETTER QUALITY THAN YOURS STOP YOU HAVE ALREADY HAD OPPORTUNITY MEET CITYS PROPOSALS HOWEVER IF YOUR COMPANY PLACES IN EFFECT RATE REDUCTION EQUAL OR GREAT-

ER THAN THAT OF CITY ELECTRIC POWER BOARD OF REVIEW WILL CONSIDER MATTER FURTHER

HAROLD L ICKES ADMINISTRATOR"

On November 15, Mr. Post replied to Mr. Ickes as follows:

"POSTAL TELEGRAPH

SPOKANE WASHINGTON
NOVEMBER 15, 1934

HON HAROLD L ICKES
PUBLIC WORKS ADMINISTRATOR
WASHINGTON D C

RE TEL TWELFTH DOCKET SIX SIX NINE FIVE COEUR DALENE IN THE CAMPAIGN BEFORE THE ELECTION AUTHORIZING BOND ISSUE IT WAS NOT ASSERTED BY THE CITY OFFICIALS OR OTHER PROPONENT THAT IF THE CITY SHOULD BE AUTHORIZED TO GO INTO THE ELECTRIC BUSINESS THERE WOULD BE ANY LOWERING OF RATES STOP IT MAY SEEM STRANGE TO YOU BUT THE FACT IS THAT CITY OFFICIALS OF COEUR DALENE AT A MEETING WITH THE PUBLIC UTILITIES COMMISSION OF

IDAHO STATED TO THAT COMMISSION IN MY PRESENCE THAT THEY WERE NOT INTERESTED IN ANY REDUCTION IN ELECTRIC RATES BUT ONLY IN MUNICIPAL OWNERSHIP STOP THE ORIGINAL PAPERS FILED BY COEUR DALENE WITH YOUR DEPARTMENT FOR A LOAN AND GRANT DID NOT CONTAIN ANY OFFER OR PROPOSAL THAT THERE WOULD FOLLOW ANY REDUCTION IN ELECTRIC RATES STOP WE WERE GIVEN A COPY OF THIS APPLICATION AND ANSWERED IT IN ACCORDANCE WITH ITS TERMS STOP SEVERAL WEEKS AFTER THE IDAHO LOCAL BOARD HAD MADE A REPORT TO WASHINGTON MISTER COE THE MAYOR OF COEUR D'ALENE WENT TO WASHINGTON AND HAD A CONFERENCE WITH SOMEONE UNKNOWN TO US STOP WE ARE NOT ADVISED AS TO WHAT HE SAID AND WE HAVE NO COPY OF ANY DOCUMENT OR PAPER IF ANY FILED BY HIM STOP YESTERDAY WE COMMUNICATED WITH MAYOR COE AND HE SAYS THAT HE FILED NO WRITING ON THAT SUBJECT AND THAT HE DID HAVE SOME CONVERSATION WITH SOME PARTY

WHOSE NAME HE REFUSES TO GIVE US AND THAT WHAT WAS SAID ABOUT REDUCTION OF RATES HE STATES HE DOES NOT REMEMBER STOP MAYOR COE HAD NO AUTHORITY FROM THE CITY GOVERNMENT TO MAKE ANY REPRESENTATION OR PROPOSAL ON THAT SUBJECT STOP WE THINK IT IS ONLY FAIR THAT WE SHOULD HAVE A COPY OF ANY WRITING OR MEMORANDUM IF ANY NOW IN THIS FILE WHICH RELATES TO ANY SUGGESTION OR PROPOSAL FOR A REDUCTION IN RATES STOP AS PERTINENT TO THIS SUBJECT WE FURTHER SUGGEST THE FOLLOWING FACTS NAMELY OF THE GROSS ELECTRIC REVENUE RECEIVED BY OUR COMPANY FROM ELECTRIC SERVICE RENDERED IN THE STATE OF IDAHO OVER EIGHTEEN PERCENT IS PAID BACK TO THE PEOPLE IN THE FORM OF FEDERAL STATE COUNTY CITY AND OTHER TAXES STOP THE MUNICIPALISTS DO NOT PROPOSE TO PAY ANY TAXES TO THE FEDERAL GOVERNMENT NOR ANY STATE COUNTY OR SCHOOL DISTRICT TAXES OR ANY MONEYS IN LIEU THEREOF STOP WHAT THEY MAY DO IN THE

MATTER OF CITY BOOKKEEPING IN THE WAY OF SHIFTING FROM ONE FUND TO ANOTHER IS PURELY A MATTER OF SPECULATION STOP THE PROPOSED MUNICIPAL PLANT DOES NOT COVER THE ENTIRE CITY BUT DELIBERATELY OMITS NOT ONLY A PORTION THEREOF WITHIN THE CITY LIMITS BUT ALSO A PORTION THEREOF JUST OUTSIDE, OF THE CITY LIMITS IN WHICH SECTIONS WE HAVE OVER THREE HUNDRED ELECTRIC CUSTOMERS STOP IN OTHER WORDS THE MUNICIPALISTS SEEK TO CORRAL THE BEST PART OF THE BUSINESS AND LEAVE THE POOREST PART TO THIS COMPANY STOP EVEN THIS PROPOSED PLANT CANNOT BE BUILT WITH THE AMOUNT OF MONEY ASKED FOR AND TO CREATE A PLANT OR SYSTEM WHICH WOULD COVER THE ENTIRE TERRITORY WOULD MATERIALLY INCREASE THE SHORTAGE STOP THIS SECTION OF THE NORTHWEST HAS BEEN WIDELY ADVERTISED FOR ITS WATER POWER DEVELOPMENTS AND POTENTIAL DEVELOPMENTS STOP THIS COMPANY HAS SIX HYDR PLANTS ON THE SPOKANE RIV-

ER ONE OF THEM BEING ONLY TEN MILES FROM COEUR DALENE STOP THE FEDERAL GOVERNMENT IS SPENDING MANY MILLIONS IN DEVELOPING TWO HYDR PLANTS IN THE COLUMBIA RIVER STOP THE CONTRACTORS FOR THE GRAND COULEE DAM WHO CERTAINLY KNOW THEIR BUSINESS HAVE BUILT A TRANSMISSION LINE FROM THE DAM SITE TO COULEE CITY AND ENTERED INTO A FIRM CONTRACT WITH THIS COMPANY FOR ALL OF THE ELECTRIC POWER NEEDED IN THAT ENTERPRISE STOP THERE CAN BE NO DOUBT THAT THESE CONTRACTORS KNOW ALL ABOUT DIESEL ENGINE PLANTS STOP THAT UNDER THESE CIRCUMSTANCES A BUREAU OR BOARD OF THE FEDERAL GOVERNMENT SHOULD SERIOUSLY CONSIDER A PROPOSAL TO FINANCE AND SUBSIDIZE A DIESEL ENGINE ELECTRIC SYSTEM IN COEUR DALENE IS MOST SURPRISING STOP THE RATES OF OUR COMPANY PREVAILING IN THIS SECTION ARE AMONG THE LOWEST IN THE UNITED STATES AND WERE SO DETERMINED BY INVESTIGATORS FOR THE

FEDERAL TRADE COMMISSION STOP PURSUANT TO ORDER OF DEPARTMENT OF PUBLIC WORKS OF THE STATE OF WASHINGTON THIS COMPANY HAS BEEN DILIGENTLY ENGAGED FOR SEVERAL MONTHS IN MAKING A COMPLETE DETAILED INVENTORY OF ALL OF ITS PROPERTY IN THE STATES OF WASHINGTON AND IDAHO STOP THIS INVENTORY IS NOW COMPLETED AND IS BEING CHECKED BY ENGINEERS AND OTHER EMPLOYEES OF SAID DEPARTMENT STOP IN THE NEAR FUTURE A TRIAL OR HEARING WILL BE HAD BEFORE SAID DEPARTMENT IN WHICH WE EXPECT THE PUBLIC UTILITIES COMMISSION OF IDAHO WILL PARTICIPATE TO DETERMINE THE FAIR VALUE OF ALL OF THE ELECTRIC PROPERTY OF THIS COMPANY AND ALSO TO DETERMINE THE REASONABLENESS OF ALL RATE SCHEDULES STOP THE RATE SCHEDULES IN EACH STATE FOR COMPARABLE CITIES TOWNS AND COMMUNITIES AND FOR AGRICULTURAL SERVICE MUST OF NECESSITY BE SUBSTANTIALLY THE SAME STOP OUR COMPANY IS CONTROLLED BY

STATE LAWS AND BY ADMINISTRATIVE AND JUDICIAL BODIES CREATED BY STATE LEGISLATURES STOP THE LAW PROVIDES THAT ITS RATES SHALL BE FAIR JUST REASONABLE ADEQUATE AND NON DISCRIMINATORY AND THERE ARE SEVERE PENALTIES FOR VIOLATIONS THEREOF STOP OUR COMPANY OF COURSE CANNOT MAKE ANY BINDING CONTRACTS WHICH MIGHT ATTEMPT TO OVERRIDE OR USURP THE FUNCTIONS OF STATE REGULATORY BODIES STOP WE ARE ADVISED BY OUR LAWYERS THAT THE PUBLIC WORKS ADMINISTRATOR HAS NO POWER OR AUTHORITY UNDER THE LAW TO MAKE ANY LOAN OR GRANT TO COEUR DALENE FOR THE PURPOSE OF CONSTRUCTING A DIESEL ENGINE ELECTRIC SYSTEM STOP WE MAKE THIS STATEMENT FOR THE PURPOSE OF NOT WAIVING THIS POINT IN ANY LITIGATION THAT MAY ENSUE HEREAFTER IF THERE SHOULD BE ANY SUCH LITIGATION STOP AS TO THE CONTENTION IN THE MATTER OF THE WATER SYSTEM THAT THE PROPOSED WATER IS DEEMED OF

BETTER QUALITY THAN THE WATER THAT IS FURNISHED BY US FROM THAT GREAT AND BEAUTIFUL LAKE WE BEG TO STATE THAT THE RECORD IN YOUR FILES WILL SHOW THAT THE PROPONENTS DO NOT KNOW WHERE THEY CAN GET THIS BETTER QUALITY OF WATER STOP THE SUGGESTION SEEMS TO BE THAT THEY MAY SINK ONE OR SEVERAL WELLS BUT HOW MANY AND WHERE AND THE QUANTITY AND QUALITY OF WATER OBTAINED THEREFROM IS PURELY SPECULATIVE STOP THE WATER FROM THE LAKE FURNISHED BY OUR COMPANY HAS BEEN HELD TO BE WHOLESOME AND POTABLE IN ACCORDANCE WITH THE STANDARDS OF THE UNITED STATES BUREAU OF HEALTH STOP PERMIT ME TO POINT OUT IN CONCLUSION THAT IF THE CITY OF COEUR DALENE SHOULD CONSTRUCT AND OPERATE THE PROPOSED SYSTEMS IN COMPETITION WITH OUR COMPANY THE INEVITABLE RESULT WILL BE THAT EACH SYSTEM WILL LOSE MONEY AND THAT THE CITY OF COEUR DALENE NOW IN A PRECARIOUS

FINANCIAL SITUATION WILL BECOME BANKRUPT
F T POST PRESIDENT
THE WASHINGTON WATER POWER COMPANY"

FTP-W
POSTAL
CHG WWP CO

On November 17, the following telegram was addressed to Mr. Post:

"WESTERN UNION
SKI 13 GOVT F WASHINGTON D C 149P
NOV 17 1934

F T POST PRES THE WASHINGTON WATER POWER CO

RETEL ADDRESSED ICKES WILL CONSIDER POINTS AND WILL ADVISE CITY OFFICIALS OUR CONCLUSIONS

H T HUNT

CHAIRMAN ELECTRIC POWER BOARD REVIEW FOR THE ADM."

On November 20, 1934, plaintiff commenced this action.

On November 20, 1934, the City of Coeur d'Alene received from the Federal Emergency Administration of Public Works at Washington, D. C., a proposed

contract for execution by the city.

Thereafter and on the 23rd day of November, an ordinance was passed and adopted by the city council, approved by the mayor and on the same day published, approving the loan and grant agreement between the city of Coeur d'Alene, and the United States and authorizing and directing its execution and transmission to the Federal Emergency Administration of Public Works, further authorizing the mayor and city clerk to consent to modifications or changes therein and to execute further agreements found desirable in connection therewith. Said agreement referred to provided for a loan and grant not exceeding $650,000 for the financing of a water system and Diesel engine generating plant and an electric distribution system. A copy of said ordinance is attached hereto marked "Exhibit C" and made a part hereof.

The proposed contract and agreement was thereupon executed by the mayor and city clerk of the City of Coeur d'Alene with a slight modification referring to the commencement of this action. A copy of said agreement as executed is attached hereto, marked "Exhibit D" and made a part hereof.

Thereafter and on the 24th day of November, 1934, the plaintiff received from the officers of the defendant city a copy of a letter to the defendant mayor from the Federal Emergency Administration of Public Works, Electric Power Board of Review, which is in words and figures as follows:

"FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS
ELECTRIC POWER BOARD OF REVIEW
Washington, D. C.
November 21, 1934

AIR MAIL

Honorable John Knox Coe,
Mayor
Coeur d'Alene, Idaho

Dear Mr. Mayor:

I have today sent to you the following telegram:

'REDOCKET SIXTYSIX NINETY-FIVE RATE ORDINANCE REQUIRED AS CONDITION OF LOAN SHOULD FIX RATES APPROXIMATELY TWENTY PER CENT BELOW EXISTING RATES STOP AIRMAIL LETTER FOLLOWS.'

The ordinance should state that the rates therein will be made available by the municipal plant and will not be increased unless and until it is proved to the satisfaction of the Administrator that the said rates are insufficient to provide for operating expenses, necessary improvements and extensions, and so much of the debt service as is represented by the proportion which the cost of the electric system bears to the cost of the entire project. It should provide also that the charges to the City itself for

street lighting and other municipal services shall not exceed the rates for such service now provided by schedules of the Washington Water Power Company until it shall be ascertained that such rates are less than the cost of service to the City. The ordinance should recite that the agreement of the City to maintain such rates and charges as aforesaid is in further consideration of the grant from the Government and is for the benefit of the electric consumers and taxpayers of the city.

It will be necessary that the ordinance be approved by the Administrator. This can be done either before or after its adoption.

Very truly yours,
Henry T. Hunt
Per O.M.R.
Henry T. Hunt
Chairman
For the Administrator."

Plaintiff further alleges that the statements contained in said telegrams of Frank T. Post, President of the plaintiff, are accurate and true.

Plaintiff further alleges that the approval of the application of the City of Coeur d'Alene and the making of said loan and grant or gift by the Federal Emergency Administration of Public Works is not made for the purpose of relieving unemployment and the relief of unemployment will not be accomplished to any extent at all thereby, but the sole and only purpose or purposes

thereof are unlawful and in violation of the National Industrial Recovery Act and in violation of the Tenth Amendment, of the Fifth Amendment and of the First section of the Fourteenth Amendment to the Constitution of the United States, such purpose or purposes being:

(1) The destruction of the property of the plaintiff because of its failure or refusal to accede to the demand of the Federal Emergency Administration of Public Works to usurp the exclusive power and function of the State of Idaho to fix and regulate the rates, charges and service of the plaintiff as a public service corporation engaged in intrastate business in that state, and to substitute coercion by an agency of the Federal Government as to such rates, charges and services in place of the lawful and orderly regulation thereof by the state regulatory body which has full, complete and ample authority in relation thereto.

(2) To foster and encourage public ownership and political operation of electric light and power systems whether they may or may not be engaged in interstate commerce.

(3) To usurp and/or override the police powers of the State of Idaho in the following additional respect, to-wit, the State of Idaho has exclusive power to provide the method of regulation of rates charged by municipally owned public utilities and the attempt of the Public Works Administrator in said contract to fix or regulate the rates to be charged by the City of Coeur

Nd'Alene, or to control the modification thereof in the future is violative of the Tenth Amendment to the Federal Constitution.

XXIII.

Plaintiff states that the actions and proceedings already taken in pursuance of the plan hereinbefore described and the threatened actions and proceedings which defendants are about to take under such plan are unlawful and invalid for the following reasons:

(1) Because the misleading, erroneous and false statements, advertisements and information put out by the mayor and members of the city council of the defendant city, and in the report of said engineer to the effect that the bond issue of $300,000 would result in no requirement for the payment of any sum, either principal or interest, through taxation, was such a fraud against the voters that it vitiated the election and renders said bonds illegal and unlawful.

(2) Because the misleading, erroneous statements, advertisements and information put out by the mayor and members of the city council of the defendant city in concealing from the citizens and voters that two sections of the city under the plan proposed would not be included within the area to be served by said proposed municipal light and power system, was such a fraud against the voters that it vitiates the election and renders the bond illegal and unlawful.

(3) Because it is provided by Section 3 of Article

VIII of the Constitution of Idaho:

> "No 'city' or other subdivision of the state shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years of the time of contracting the same."

Said section further provides, "any indebtedness or liability incurred contrary to this provision shall be void."

The plan and scheme of the defendants provides for the creation of an indebtedness and/or liability in excess of $300,000 for said plant and distribution system within the meaning and restriction of said Section 3 of Article VIII of the Idaho Constitution.

(4) That the said Ordinance No. 723 (Exhibit C attached to this Amended Bill of Complaint) and the said proposed loan and grant agreement (Exhibit D) provide for one project, to-wit, a project for financing the construction of a water system, including sinking wells, installing pumps, and a distribution system for water service, also a Diesel engine generating plant and an electric distribution system, under which the said de-

fendant city and its officers propose to borrow or receive from the United States in the aggregate the sum of $650,000.

That the said ordinance and said agreement are violative of Ordinance No. 713, calling for an election for the purpose of submitting the proposition of incurring an indebtedness of $300,000 by the issuance of municipal bonds for the purpose of paying the costs and expenses of the acquisition by purchase or construction of a light and power plant and distribution system for said city. That there has never been submitted to the voters of said city a proposal for the incurring of an indebtedness such as proposed in said Ordinance No. 723 or in said proposed agreement, Exhibit D.

(5) Because the National Industrial Recovery Act does not authorize or purport to authorize the Federal Emergency Administration of Public Works to loan moneys or give moneys of the Federal Government for the building or municipal Diesel engine power generating plants and electric distribution systems. While such act does authorize the making of loans and gifts of money for the building of certain named and specified public works, none of the enumerated public works are of the character applied for by the City of Coeur d'Alene.

(6) Because the National Industrial Recovery Act by particularly enumerating "Development of Water Power" and "transmission of electric energy" in the list of public works for which public moneys might be loan-

ed and/or granted, must be held to have excluded from the project included in said act such purported Diesel engine generating plant and electric distribution system as is proposed by the City of Coeur d'Alene, in its said application.

(7) Because the National Industrial Recovery Act since it does not expressly include in the enumeration of public works which might be constructed with loans and gifts of public moneys, municipal Diesel engine electric generating plants and distribution systems, cannot be held to have that meaning by the implication in view of the fact that the building of such competing municipal electric generating plants and distribution systems will result in vast destruction of investments, in creating unemployment rather than reducing and relieving it, has no relation whatever to interstate or foreign commerce, will do nothing to improve standards of labor, increase purchasing power; will not eliminate unfair competitive practices, but will tend to promote unfair competition, and will not promote or tend to promote the fullest possible utilization of the present productive capacity of industries, but rather to render useless part of the present productive capacity of the plaintiff and similar industries; nor will it otherwise promote any of the purposes set forth in the declaration of the policy of Congress contained in Section 1 of said act.

(8) Because the plan and scheme of creating an obligation of the defendant city for the proposed municipal electric plant is violative of the limitations of municipal

indebtedness imposed by Section 3 of Article VIII of the Constitution of Idaho, and subdivision (d) of Section 203 of the National Industrial Recovery Act, providing:

> "The President in his discretion and under such terms as he may prescribe, may extend any of the benefits of this title to any State, county or municipality, notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county or municipality to borrow money or incur indebtedness,"

cannot be held to repeal, nullify or abrogate the Constitution or laws of the State of Idaho. Such provision of the act of congress is violative of the Tenth Amendment to the Constitution of the United States in that it purports to authorize an unlawful invasion of power reserved to the state and not delegated to the United States.

(9) Because the defendant city is not now engaged in nor does it propose to engage in interstate commerce or in any business or activity interstate in character. The electrical utility business which it proposes to create by the said power plant and distribution system is wholly within the County of Kootenai, State of Idaho, and is entirely local and intrastate in character. No emergency exists which authorizes or justifies the making of the loan and gift by the Federal Emergency Administration of Public Works to the defendant city and/or the construction of the proposed municipal elec-

tric power plant and distribution system. In view of such facts and other facts herein stated, such proposed loan and gift are violative of the policy of the National Industrial Recovery Act.

(10) Because the proposed loan and gift by the Federal Emergency Administration of Public Works to the city would be illegal for the reasons herein specified, and the city would, therefore, be required to refund and repay to the Federal government not only the amount of the loan at such time as the Federal government should elect and irrespective of the maturity of the bonds issued by the city, but would also be required to refund to the Federal government the gift or grant so made to the city by the Federal Emergency Administration of Public Works. By reason of the invalidity of the proposed loan and gift or grant, the city would thereby become indebted in an amount in excess of that authorized by Section 3 of Article VIII of the Constitution of the State of Idaho, and the defendants by their acts are attempting to incur an indebtedness and create a liability exceeding the annual income and revenue of said city for such year without the assent of two-thirds of the qualified electors voting at an election held for that purpose.

(11) Because the issuance of the proposed bonds by the city and the use and application of the proceeds thereof and of the proposed gift or grant of the Federal Emergency Administration of Public Works for the reasons in this complaint stated are violative of the

Fifth Amendment and of Section 1 of the Fourteenth Amendment of the Constitution of the United States in that it deprives this plaintiff of its property without due process of law.

(12) Because under the Constitution of the United States Congress has no power to make a loan and gift or grant of public moneys of the United States to the City of Coeur d'Alene, for the purpose of constructing a municipal electric plant, the effect of which is to duplicate and destroy the value of existing adequate facilities for the same purpose and the making of such loan and gift or grant is, therefore, prohibited by the Constitution of the United States, and particularly by the Fifth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

(13) Because no unusual emergency has arisen which necessitates the making of a loan and gift by the Federal Emergency Administration of Public Works for the construction of a municipal electric plant and system at Coeur d'Alene. The conditions with respect to the rendition of electric service at Coeur d'Alene are now the same as they have been for a number of years in the past, except that substantially lower rates for such service have been made effective in recent years and material improvement made in the plant and service. Plaintiff is adequately supplying all demand for electric service in the city. The effect of such loan and gift will directly decrease instead of promote the fullest possible utilization of the present productive capacity

of the electrical industry and particularly that portion of the industry carried on by the plaintiff.

The construction of a municipal electric system will merely constitute an unneeded and wasteful duplication of systems and facilities resulting in a division of business and revenues between the plaintiff and said city with no corresponding decrease in fixed charges and costs of service and ultimately making it impossible for either utility to continue to operate on a sound economic basis and serve the public.

The making of a loan and gift to the defendant city for the building of a duplicate system under the existing facts, therefore, cannot be warranted under any invocation of emergency power of the Federal government, whereby the reserved power of the states is usurped, and the exercise of such claimed power is violative of the Tenth Amendment of the Federal Constitution.

(14) The action of the Federal Administrator of Public Works in including the project involved herein among those to be financed with funds of the United States under the National Industrial Recovery Act is illegal, and invalid for the reason that even if congress has the power to appropriate moneys and to authorize the Administrator of Public Works to expend the same by loans or by gifts or grants for certain specified purposes named in the act of congress, without allocation therefor by congress for any particular enterprise or class of enterprises, still, it would be unlawful delegation of congressional legislative powers to the Pres-

ident of the United States or to the Administrator of Public Works to authorize them, or either of them, to spend that money for any purpose which they, or either of them, may think would be for the good of the country or for the general welfare of the United States. If, under said act, therefore, the said Administrator of Public Works may distribute money for "development of water power" and/or "transmission of electrical energy," such administrator cannot distribute money for building a Diesel engine generating plant, and if any such power is exercised or attempted to be exercised under Section 202 of the National Industrial Recovery Act, on the theory that the same is granted under the authority to prepare a comprehensive plan of public works, "which shall include among other things the following," and the same are not included therein, such grant of power would be invalid and an unlawful delegation of congressional legislative power and contrary to the Constitution of the United States.

(15) Said project for which such disbursements of public funds of the United States is threatened is entirely local for the exclusive benefit of the users of electricity in and about the City of Coeur d'Alene, Idaho, alone, and is and can be of no general benefit to the nation as a whole or tend to provide for or affect the general welfare of the United States.

(16) Said project does not constitute any public use or any object or purpose affecting or in aid of providing for the general welfare of the United States, in

that the sole and only recipients and beneficiaries of said expediture are and will be the individual consumers of electricity in and about the City of Coeur d'Alene, who are already being adequately served and supplied by private capital and enterprise, and the private firms, corporations and individuals engaged in the manufacture, sale, assembly and installation of the materials and appliances consisting of wires, cables, conduits, poles, supports, transformers, switches and other articles constituting and composing said electric distributing system. That if any secondary or incidental benefit might result from the stimulation of the manufacture, sale, assembly and installation of such articles, the same would be merely an incidental benefit, remote and contingent, depending upon the immediate actions, conduct and operations of such manufacturers and sellers of such articles of equipment and contractors and builders for their installation and the expenditure of funds for such purpose would constitute merely a disbursement and expediture for the private gain and profit of such manufacturers, producers and sellers and contractors and builders engaged in assembly and erection of such system.

(17) The provisions of Sections 202 and 203 of Title II of the National Industrial Recovery Act are invalid as constituting an unlawful delegation of congressional legislative powers to the President of the United States and an unlawful delegation of such power to the Administrator of Public Works, contrary to the Constitution of the United States.

(18) Congress has no power to appropriate moneys to the President or to any administrative bureau or board to be expended for any project except as specifically mentioned and described in the act appropriating such money, or some other act of congress. To delegate to the president or to the Public Works Administrator the power to loan or grant such, or any, appropriated moneys for the building or purchase by cities of any Diesel engine electric light plant or system as might meet with the approval of the President or the Public Works Administrator, and in his or their sole discretion, would be an unlawful and invalid delegation of power.

(19) The action of the Federal Administrator of Public Works in including the project involved herein among those to be financed with funds of the United States under the provisions of Sections 202 and 203 of the National Industrial Recovery Act is an arbitrary, unreasonable and capricious exercise of delegated authority, in that the construction of a Diesel engine electric generating plant and a distribution system in the City of Coeur d'Alene and the disbursement of public funds of the United States for such purpose does not and will not accomplish or tend to accomplish any of the purposes or objects of the said National Industrial Recovery Act in that it does not tend "to eliminate unfair competitive practices" but to increase and promote such unfair competitive practices nor to "promote the fullest possible utilization of the present production capacity of industry," but rather to discard and render useless much of the productive capacity of plaintiff and

similar industries; it does not increase or tend to increase employment but on the contrary tends to reduce employment by curtailing the business and operations of plaintiff, necessitating the permanent discharge of many of plaintiff's employees.

(20) The action of the Federal Administrator of Public Works in including the project involved herein among those to be financed with funds of the United States under the National Industrial Recovery Act is an arbitrary, unreasonable and capricious exercise of delegated authority for the reason that the financial condition of the City of Coeur d'Alene, is so unsound that repayment of said loan is not reasonably secured and such condition was so obvious and so well known to said Administrator that his action in approving and making said loan was in utter disregard of the provisions of Section 203 of said act.

(21) Said project and threatened disbursements of public funds from the United States and use of such funds in furtherance of said project are and will be illegal, unlawful and in violation of the Tenth Amendment to the Constitution of the United States on account of the following facts and for the following reasons, to-wit:

The Federal Public Works Administrator, Harold L. Ickes, has publicly announced a controlling policy and put such policy into effect and operation as a rule of administration, of invading and interfering with the reserved powers of the states, in this instance, the State

of Idaho, and particularly its police powers to regulate foster and protect and preserve public utilities within its borders and to regulate the rates and service of public utilities including plaintiff. Irrespective of such announced policy, the vesting in said Ickes of the delegated legislative power involved herein would make it possible for him to pursue such a policy. No such power was delegated to Ickes by any act of congress and any attempted delegation of such power would be beyond the power of Congress.

The matter of exposing privately owned public utilities, including the plaintiff, to ruinous competition or protecting them from such competition to the end that they may survive and be ready, able and willing to afford public utility service to the cities, towns, villages and rural communities and for mining, irrigation, industrial and other public and beneficial uses throughout the state which may not now or hereafter be objects of Federal bounty and aid; and the matter of fostering and protecting such privately owned utilities so that they may establish financial credit and encourage the investment of private capital in their business and properties to the end that such utilities may expand and extend their services with the growth and development of the private domestic and industrial needs therefor, independently of the necessity of financing by public bonds issued and disbursements of public funds, and all matters reserved to the several states, including the State of Idaho, under the Tenth Amendment to the Constitution of the United States, and are subjects to

be determined, regulated and supervised under the sovereign police powers of the state which cannot be surrendered or delegated to the United States or any of its administrative agencies or officers.

The matter of regulating the rates for service and the quality, character and extent of utility service are likewise matters, the control of which is reserved to the respective states and the power of control of which cannot be surrendered or delegated by the states.

Nevertheless, said Ickes has publicly announced and put into effect, and irrespective of such public announcement, would if the transactions herein complained of be deemed lawful, be able to put into effect according to his uncontrolled, arbitrary and capricious determination, a policy of granting or withholding the grant of public funds of the United States for use in establishing utility plants in ruinous competition with existing privately financed plants dependent upon whether or not such privately financed plants comply with his wishes with reference to their operations and the regulation of their rates. Said Ickes accordingly by such claimed discretionary power of granting or withholding grants of national public funds for such projects is and would be enabled to bring the entire regulation of intrastate public utilities under his control and domination.

(22) Said loan and grant of public funds of the United States are in excess of and outside the scope of the National Industrial Recovery Act in that they

constitute merely the financing by the Federal government of a purely local and proprietary business.

XXIV.

Plaintiff has no adequate remedy at law to protect its rights as a taxpayer, as a franchise holder and as the owner of the electric utility business now being operated by it in the City of Coeur d'Alene, or its operating rights and privileges to conduct said electric utility business in the City of Coeur d'Alene against unlawful competition by the defendant city, and unless the defendant city and other defendants constituting its officials are enjoined from creating the unlawful, invalid and unconstitutional obligations and indebtedness provided by the plan and scheme herein described and from constructing, maintaining and operating the proposed municipal electric plant under such plan and scheme, the plaintiff will be irreparably damaged.

XXV.

That the defendant city and the defendant city officials propose and threaten to enter into a contract with the Federal Emergency Administration of Public Works, hereinbefore referred to, and to issue and deliver bonds of the defendant city. That unless the defendants and each of them is immediately restrained from so doing, they will enter into said contract and deliver said bonds and receive funds from the said Federal Emergency Administration of Public Works to the irreparable damage of the plaintiff, whereas, the re-

straint of the doing thereof until this cause is determined would result in no detriment or injury to the defendant.

WHEREFORE, plaintiff prays:

(1) That the City of Coeur d'Alene, Idaho, and the defendants, J. K. Coe, Mayor, A. Grantham, Treasurer, William T. Reed, Clerk, Lee Stoddard, Otto Gladden, Frank H. Lafrenz, Joseph Loizel, O. M. Husted, Cassius Robinson, S. H. McEuen and C. C. Hodge, members of the City Council of said City of Coeur d'Alene, Idaho, and Harold L. Ickes as Federal Emergency Administrator of Public Works, their assistants, agents, employees, attorneys and all persons acting through or under them, or any of them, be forever restrained and enjoined from the issuance, pledge, sale or delivery of any of the bonds of said city which are purported to be authorized by Ordinance No. 713 of said city, and from procuring, accepting, using or applying any moneys, the proceeds of any loan or gift or grant from the Federal Emergency Administration of Public Works for the building of a municipal electric power and distribution system in accordance with the application of the city to the said Federal Emergency Administration of Public Works, made on or about the 14th day of December, 1933.

(2) That the defendant city and the defendant officers, their assistants, agents, employees, attorneys and all persons acting through or under them, or any of them, be forever enjoined and restrained from erecting

an electric generating plant and/or distribution system in said city by use and application of the proceeds of the bond issue proposed to be authorized by Ordinance No. 713 of the said city, of the proceeds of any loan or gift or grant from the Federal Emergency Administration of Public Works, or by means of any pledge of the receipts of said plant or distribution system.

(3) That the defendant city, and the defendant officers, their assistants, agents, employees, attorneys and all persons acting through or under them, or any of them, be restrained and enjoined from the sale or delivery of any of the bonds of said city which are purported to be authorized by Ordinance No. 713 of said city until the said defendants have provided for an annual tax in addition to all other taxes, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years, and after an election as provided and required by Section 3 of Article VIII of the Constitution of the State of Idaho.

(4) That said defendant city and the defendant city officers, and each of the defendants, their assistants, agents, employees, attorneys and all persons acting through or under them, or any of them, be enjoined and restrained during the pendency of this action from entering into any contract with the Federal Emergency Administration of Public Works for the purpose of providing for or in furtherance of the construction of a municipal electric power generating and distribution

system and/or from delivering to the said Federal Emergency Administration of Public Works any bonds of the city or from accepting or receiving any moneys thereon or therefor, or from accepting any gift or grant on account thereof, or from entering into any contract with respect to the building of or for the purpose of or in furtherance of the construction of a municipal electric power generating and distribution system in the City of Coeur d'Alene.

(5) Pending the final hearing of this suit, that the defendants and each of them, their officers, agents, attorneys and all persons acting through or under them, be enjoined and restrained from proceeding with or making effective any act or transaction in connection with or in furtherance of the construction of a municipal electric generating plant and distribution system, or the financing thereof with Federal Emergency Administration of Public Works funds or gifts or grants, or from issuing, pledging, selling or delivering any bonds of said city which are purported to be authorized by said Ordinance No. 713, or accepting, using or applying any moneys the proceeds of any loan, grant or gift from the Federal Emergency Administration of Public Works for any of said purposes.

(6) That this court grant unto the plaintiff a temporary restraining order against the defendants, their officers, agents, attorneys and all persons acting through or under them, or any of them, until the matter of plaintiff's application for preliminary injunction shall be

heard and determined, enjoining and restraining them from proceeding with or making effective any act or transaction in connection with or in furtherance of the construction of a municipal electric generating plant and distribution system, or the financing thereof with Federal Emergency Administration of Public Works funds or gifts or grants, or from issuing, pledging, selling, or delivering any bonds of said city which are purported to be authorized by said Ordinance No. 713, or acting, using or applying any moneys the proceeds of any loan, grant or gift from the Federal Emergency Administration of Public Works for any of said purposes.

(7) That this court grant to this plaintiff all other relief that it may be entitled to in equity, including such restraining orders, interlocutory injunction orders and other interlocutory relief as may be required to protect its said rights.

That plaintiff may have and recover its costs herein.

JOHN P. GRAY
W. F. McNAUGHTON
ROBERT H. ELDER
Attorneys for Plaintiff
Coeur d'Alene, Idaho

STATE OF IDAHO,
COUNTY OF KOOTENAI, } ss.

J. E. E. Royer, being first duly sworn, on oath deposes and says:

That he is the General Manager of The Washington Water Power Company, a corporation of the State of Washington, the complainant named in the above and foregoing amended bill in equity and as such officer makes this verification for and on behalf of said corporation, being duly authorized so to do; that he has read the foregoing amended bill in equity and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief and as to those matters, that he believes it to be true.

J. E. E. ROYER

Subscribed and sworn to before me this 3rd day of December, 1934.

F. MEADE

SEAL

Notary Public in and for the State of Idaho, residing at Coeur d'Alene, Idaho

EXHIBIT A.

ORDINANCE NO. 713

AN ORDINANCE PROVIDING FOR THE INCURRING BY THE CITY OF COEUR D'ALENE, IDAHO, OF A MUNICIPAL INDEBTEDNESS OF $300,000.00 BY THE ISSUANCE OF THE MUNICIPAL COUPON BONDS OF SAID CITY IN SAID PRINCIPAL AMOUNT FOR THE PUR-

POSE OF PAYING THE COST AND EXPENSES OF THE ACQUISITION, BY PURCHASE OR BY CONSTRUCTION THEREOF, OF A LIGHT AND POWER PLANT FOR SAID CITY: SPECIFYING THE TIME SAID BONDS SHALL BEAR, AND FOR THE ISSUANCE OF SAID BONDS OF THE AMORTIZATION PLAN AND FOR ANNUAL INTEREST TAX LEVIES AND ANNUAL BOND PRINCIPAL TAX LEVIES AND FOR THE CREATION OF A SINKING FUND FOR THE PAYMENT OF THE PRINCIPAL AND THE INTEREST UPON SAID BONDS AND FOR THE PAYMENT OF SAID INDEBTEDNESS THUS TO BE INCURRED, WITHIN THE ULTIMATE MATURITY OF SAID BONDS AND WITHIN TWENTY YEARS FROM THE TIME OF CONTRACTING SAID INDEBTEDNESS: CALLING A SPECIAL ELECTION FOR SUBMISSION TO THE QUALIFIED TAXPAYER ELECTORS OF SAID CITY THE QUESTION OF THE RATIFICATION OR REJECTION OF SAID INDEBTEDNESS AND SAID BOND ISSUE FOR SAID PURPOSE, AND PROVIDING FOR NOTICE THEREOF AND FOR THE HOLDING THEREOF, FOR THE PUBLICATION OF THIS ORDINANCE AND DE-

CLARING THE EFFECTIVE DATE OF THIS ORDINANCE.

BE IT ORDAINED by the Mayor and City Council of the City of Coeur d'Alene, Kootenai County, Idaho:

Section 1. That the City of Coeur d'Alene, Idaho, shall issue its general obligation municipal coupon bonds in the principal amount of $300,000.00 and incur a municipal indebtedness in said amount for the purpose of acquiring by purchase or construction a light and power plant for said city, also including plant site, transmission and distribution lines and the necessary rights of way for the same.

Section 2. That said bonds shall run for a period of twenty (20) years after their date of issue which shall be the ultimate maturity of such bonds and the annual principal bond maturities thereof and the principal amounts which will be paid annually shall be amortized and payable in accordance with the provisions of the "Municipal Bond Law" of the State of Idaho, being Chapter 262 of the Session Laws of Idaho of 1927, whereby (and it is further ordained hereby) the first annual amortized bond principal payment shall mature and be payable at the expiration of two years from and after the date of issue of said bonds and the various annual principal maturities, as nearly as practicable, shall be in such principal amounts as will, together with accruing interest on all outstanding bonds of this bond issue, be met and paid by an equal annual tax levy for the payment of the principal of said bonds and interest thereon during the term of years as aforesaid, for which

said bonds shall be issued; which said bonds shall bear interest at a rate not exceeding six percent (6%) per annum, which interest shall be payable semi-annually, and which bonds in denominations and in all other respects shall be as provided by law and consistent with the provisions of said "Municipal Bond Law" and the law of this state and as hereafter prescribed specifically by the City Council.

Section 3. The Mayor and City Council of the City of Coeur d'Alene shall levy and cause to be levied and collected annually at the times when and in the manner in which other general taxes of said city are levied and collected, upon all the taxable property within the limits of said city, in addition to all other authorized taxes and assessments, an annual tax sufficient to meet and pay the interest on such indebtedness as it falls due, according to the foregoing, and also to meet and to pay the foregoing bond principal amounts as they mature and to constitute a sinking fund for the payment of the principal of said indebtedness and said bond issue as said bonds mature and within the ultimate maturity of this bond issue and within twenty years from the time of contracting the same as required by law; and said tax levies thus specified are hereby ordained and directed to be made and said sinking fund is hereby ordained and directed to be made, and is hereby constituted and created in the office of the Treasurer of this city.

Section 4. That a special election of the qualified electors who are taxpayers of said City shall be and is

hereby ordered to be held in said city on Tuesday, the 12th day of December, 1933, between the hours of nine o'clock A. M. and seven o'clock P. M. at which election the question of the issuance of said bonds and the incurring of said indebtedness thereby for the foregoing purpose shall be submitted to the votes and to the assent or rejection of such qualified taxpayer electors. All qualified electors of said State and of this city, as provided by law, who are taxpayers of said city (and who are registered as required by law) shall be entitled to vote at such election. The election will be held at the following voting places within said city, viz:

First Ward, Fire Station.

Second Ward, Central School.

Third Ward, Fullers Garage.

Fourth Ward, High School Gymnasium.

Such voting places and the ballot boxes for said special election will open at the hour of nine o'clock A. M. and will continue open until, and will close at, the hour of 7:00 o'clock P. M. on said day. The voting at said election shall be by ballot and the proposition which shall be submitted thereon at said election shall be substantially in the following alternative form, viz:

"IN FAVOR OF ISSUING BONDS to the amount of $300,000.00 for the purpose stated in Ordinance No. 713",

and

"AGAINST ISSUING BONDS to the amount

of $300,000.00 for the purpose stated in Ordinance No. 713".

If at such election two thirds of the electors qualified and entitled to vote at said election and being taxpayers of and in said city, voting at such election, assent to the issuing of such bonds and the incurring of the indebtedness thereby created, for the purpose aforesaid, such bonds for said purpose shall be issued as provided herein and in the maner provided by the "Municipal Bond Law" of the State of Idaho above referred to.

Section 5. Notice of said election shall be published in the Coeur d'Alene Press, a daily newspaper printed and published within this municipal corporation and having a general circulation therein, for the period of thirty days prior to the date fixed for said election; the publication of such notice in said newspaper to be in all daily issues thereof during said period of time, which said published notice shall clearly set forth the date of such election, the voting places therefor, the propositions which shall be submitted at such election to the qualified electors, the hours during which the voting places shall be open, and shall contain such other information as is required, or as may be permitted by law, and shall refer to this ordinance for further details and particulars, and shall be given in the name of the Mayor and Council of this City by the Mayor and Clerk thereof.

Section 6. The City Clerk, the registrar for city elections, shall register the qualified electors who are

taxpayers for said election, commencing with the day that the notice of election is given and first published and thereafter as provided by law, at any time during office hours, and at any other times, all as provided by statute, and shall cause such notice of registration to be given as required by law. The City Clerk shall provide at the expense of this City registration books, blank electors oaths and all other election supplies for said election as provided and required by law.

Section 7. In the event that the federal government shall grant or donate to the city moneys to pay a part of the cost and expense of the foregoing, it will be proper for the City Council to sell and to issue only such amount of bonds as shall be required to pay that part of the cost and expense of the foregoing thus left unprovided for:

Section 8. This ordinance shall take effect and be in full force upon its pasage, approval and publication in one issue of the Coeur d'Alene Press, a newspaper of general circulation printed and published in the City of Coeur d'Alene and the official newspaper thereof.

Passed under suspension of rules upon which a roll call vote was duly taken, and duly enacted an ordinance of the City of Coeur d'Alene, at a regular meeting of the City Council of said City held on November 2, 1933, at the hour of 7:30 o'clock P. M.

Approved by the Mayor this 2nd day of November, 1933.

JOHN KNOX COE

Mayor

Attest:

WILLIAM T. REED

City Clerk.

EXHIBIT B.

ORDINANCE NO. 94

An Ordinance granting Consumers Company, a Corporation created and existing under and by virtue of the law of the State of Idaho, a Franchise for furnishing to the inhabitants of the village of Coeur d'Alene, Idaho, electricity for lighting and other purposes, and authority for placing and maintaining poles and wires and other facilities for the transmission of electricity in the streets and alleys of said village.

BE IT ORDAINED by the Chairman and Board of Trustees of the Village of Coeur d'Alene, Kootenai County, Idaho.

Section 1. That the Consumers Company, a Corporation created under the laws of the State of Idaho, its successors and assigns, be and they are hereby granted the right of furnishing the Village of Coeur d'Alene, Idaho, and the inhabitants thereof, with electricity for lighting, heating, power and all other purposes for

which it may be adapted for the period of Fifty (50) years from the date hereof.

Section 2. Said Company, its successors and assigns, are hereby authorized to erect and maintain poles, wires and other facilities for the transmission and distribution of electricity for lighting, heating, power and all other purposes to which it may be adapted, in and along any and all of the streets and alleys of said Village within the limits of said Village as they now exist or may hereafter be extended; and also the right to lay and maintain such wires and other facilities under ground whenever it may elect to do so.

Section 3. Such poles shall be of uniform height as nearly as practical, of not less than twenty-five (25) feet in height above the ground in alleys, and not less than thirty (30) feet in height above ground in streets, and shall be set at least five (5) feet in ground. Poles erected on Sherman Street between First and Ninth, shall be uniform in height and color with the telephone poles now maintained on such street, and shall be protected by hoop iron wrapping or otherwise for at least six (6) feet above curb. All wires shall be suitably insulated where attached to poles, and shall be strung in such maner as to give as little obstruction to the free use of the streets and allays as practical.

Section 4. Said Company, or its succesors or assigns, shall, at the expense of said village, place arc lights at such points upon the streets of said village as said village may designate and shall furnish lights to said vil-

lage for street lighting purposes during the continuance of the Franchise hereby granted, upon such terms as may be agreed upon hereafter.

Section 5. Said Company, its successors and assigns, shall furnish to the inhabitants of said village, at reasonable rates, and without discrimination, electric lights of standard candle power, as soon as its plant shall be in operation, and thereafter during the continuance of the Franchise hereby granted.

Section 6. Said Consumers Company, its successors and assigns, shall within ten (10) days after the passage and approval of this Ordinance, file with the clerk of said village its written acceptance of the terms hereof, and of the terms of Ordinance No. 93, entitled "An Ordinance granting to the Consumers Company, its successors and assigns, the rights to furnish water to the inhabitants of the village of Coeur d'Alene, Kootenai County, Idaho, etc.," otherwise neither said Consumers Company nor its successors nor assigns, shall acquire any right hereunder.

Section 7. Said Consumers Company, its successors and assigns, shall, within six (6) months from the date hereof, complete and place in operation a suitable lighting plant and system of wiring for the distribution of electricity for lighting and other purposes, throughout the said village.

Section 8. This Ordinance shall take effect upon its passage and its publication in one regular issue of the Coeur d'Alene Press, a weekly newspaper of general

circulation, published in said Village of Coeur d'Alene, Idaho.

Passed the first reading at a special meeting of the Board of Trustees called for that purpose, held October 19th, 1903.

Passed its second reading, under suspension of the rules, at a special meeting of the Board of Trustees called for that purpose, held October 19th, 1903.

Passed its third and final reading, and duly enacted an ordinance of the Village of Coeur d'Alene, Idaho, at a special meeting of the Board of Trustees, called for that purpose, held October 19th, 1903.

Approved October 19th, 1903.

A. V. CHAMBERLAIN
Chairman, Board of Trustees

Attest:
James H. Harte
Village Clerk

Published in the Coeur d'Alene Press, a weekly newspaper published in the Village of Coeur d'Alene, Idaho, in its regular issue of October 24th, 1903.

James H. Harte
Village Clerk

EXHIBIT "C"

ORDINANCE NO. 723

AN ORDINANCE APPROVING A LOAN AND GRANT AGREEMENT BE-

TWEEN THE CITY OF COEUR D'ALENE, KOOTENAI COUNTY, IDAHO, AND THE UNITED STATES OF AMERICA, AND AUTHORIZING ITS EXECUTION, AND PROVIDING FOR THE PUBLICATION THEREOF.

BE IT ORDAINED by the Mayor and City Council of the City of Coeur d'Alene, Kootenai County, Idaho:

Section 1. That the Loan and Grant Agreement between the City of Coeur d'Alene, Kootenai County, Idaho, and the United States of America, under and subject to the terms of which the United States will by loan and grant not exceeding in the aggregate the sum of $650,000.00 aid said City of Coeur d'Alene in financing the construction of a water system including sinking wells, installing pumps and a distributing system for water service; also a Diesel engine, generating plant, and an electric distributing system, a copy of which Loan and Grant Agreement is filed among the Public Records of the City of Coeur d'Alene in the office of the City Clerk thereof, and which Loan and Grant Agreement is hereby made a part hereof, be, and the same is hereby in all respects approved.

Section 2. That the Mayor of said City of Coeur d'Alene be, and he is hereby authorized and directed to execute such Loan and Grant Agreement in triplicate on behalf of the City of Coeur d'Alene, and the City Clerk of said City of Coeur d'Alene be, and he is hereby

authorized and directed to impress or affix the official seal of said City each of said three copies of said Loan and Grant Agreement, and to attest such seal.

Section 3. That the said Mayor of said City be, and is hereby authorized and directed to forthwith forward three copies of said Loan and Grant Agreement as executed on behalf of said City of Coeur d'Alene, to the Federal Emergency Administration of Public Works, Washington, D. C.

Section 4. That the Mayor and City Clerk be, and they are hereby authorized and empowered on behalf of said City and the City Council to request and consent to modifications of or any changes in said Loan and Grant Agreement with reference to the designation, date, denominations, medium of payment, places of payment, and registration or conversion privileges of the bonds to be issued thereunder in order to comply with the requirements of law and of the proceedings taken for the issuance of said bonds, and to execute in the same manner as said Loan and Grant Agreement any further instruments that may be found desirable in connection with such modifications or changes.

Section 5. That said Mayor be, and he is hereby authorized and directed to forthwith send to said Federal Emergency Administration of Public Works, two certified copies of this ordinance and two certified copies of the proceedings of the City Council in connection with the adoption of this ordinance, and such further documents or proofs in connection with the approval

and execution of said Loan and Grant Agreement as may be required by said Federal Emergency Administration of Public Works.

Section 6. This ordinance shall take effect and be in full force after its passage, approval and publication in one issue of the Coeur d'Alene Press, a newspaper of general circulation in said City of Coeur d'Alene, and the official newspaper thereof.

Passed under suspension of rules upon which a roll call vote was duly taken and duly enacted in ordinance of the City of Coeur d'Alene, at a special meeting of the City Council held at the Council Chambers in the City Hall at Coeur d'Alene, Kootenai County, Idaho, the 23rd day of November, A. D. 1934, at the hour of one o'clock P. M.

Approved by the Mayor this 23rd day of November, A. D., 1934.

JOHN KNOX COE
Mayor

Attest: WILLIAM T. REED
City Clerk

(Seal of the City of Coeur d'Alene)

"EXHIBIT D"

LOAN AND GRANT AGREEMENT

between the

CITY OF COEUR D'ALENE

KOOTENAI COUNTY, IDAHO,

and the

UNITED STATES OF AMERICA

P. W. A. Docket No. 6695

PART ONE—Exhibit "D"

1. *Purpose of Agreement.* Subject to the terms and conditions of this Agreement, the United States of America (herein called the "Government") will, by loan and grant not exceeding in the aggregate the sum of $650,000 (herein called the "Allotment") aid the City of Coeur d'Alene, Kootenai County, Idaho (herein called the "Borrower") in financing a project (herein called the "Project") consisting substantially of the construction of a water system, including sinking wells, installing pumps and a distributing system for water service; also a Diesel engine generating plant and an electric distributing system, all pursuant to the Borrower's application (herein called the "application") P. W. A. Docket No. 6695, Title II of the National Industrial Recovery Act (herein called the "Act") and the Constitution and Statutes of the State of Idaho (herein called the "State").

2. *Amount and Method of Making Loan.* The Borrower will sell and the Government will buy, at the principal amount thereof plus accrued interest, $504,000 aggregate principal amount of negotiable coupon bonds (herein called the "Bonds") of the description outlined below or such other description as may be satisfactory

to the Borrower and to the Administrator, bearing interest at the rate of 4 percent per annum, payable semiannually from date until maturity, less such amount of the Bonds, if any, as the Borrower may sell to purchasers other than the Government.

(a) Date: September 1, 1934.

(b) Denomination: $1,000.

(c) Place of Payment: At the office of the city treasurer, Coeur d'Alene, Idaho, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York.

(d) Registration Privileges: As to both principal and interest.

(e) Maturities: Payable, without option of prior redemption, on September 1 in years and amounts as follows:

Year	Amount	Year	Amount
1936	$18,000	1946	$27,000
1937	19,000	1947	28,000
1938	20,000	1948	29,000
1939	21,000	1949	30,000
1940	21,000	1050	32,000
1941	22,000	1051	33,000
1942	23,000	1052	34,000
1943	24,000	1953	36,000
1944	25,000	1054	36,000
1945	26,000		

(f) Security: General obligations of the Borrower payable as to both principal and interest from ad valorem taxes which may be levied without limit as to rate or amount upon all the taxable property within the territorial limits of the Borrower.

3. *Amount and Method of Making Grant.* The Government will make and the Borrower will accept, whether or not any or all of the Bonds are sold to purchasers other than the Government, a grant (herein called the "Grant") in an amount equal to 30 per centum of the cost of labor and materials employed upon the Project. The determination by the Federal Emergency Administrator of Public Works (herein called the "Administrator") of the cost of the labor and materials employed upon the Project shall be conclusive. The Government will make part of the Grant by payment of money and the remainder of the Grant by cancellation of Bonds or interest coupons or both. If all of the Bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money. In no event shall the Grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $175,000.

4. *Bond Proceedings.* When the Agreement has been executed, the Borrower (unless it has already done so) shall promptly take all proceedings necessary for the authorization and issuance of the Bonds.

5. *Bond and Grant Requisitions.* From time to time after the execution of this Agreement, the Borrower shall file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requisition together with such documents being herein collectively called a "Requisition").

6. *Bond Purchases.* If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, in such amount as will provide, in the judgment of the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment for such Bonds shall be made at a Federal Reserve Bank to be designated by the Administrator or at such other place or places as the Administrator may designate, against delivery by the Borrower, of such Bonds, having all unmatured interest coupons attached thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the Project.

7. *Grant by Payment of Money.* If a Requisition re-

questing the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the Borrower at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) 25 per centum of the cost of the labor and materials shown in the Requisition to have been employed upon the Project if the Requisition shows that the Project has not been completed, or

(b) 30 per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined;

Provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between the Allotment and the amount paid (not including the amount paid as accrued interest) for the Bonds taken up by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds or interest coupons or both rather than by payment of money if, in the judgment of the Administrator, the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

8. *Grant by Cancellation of Bonds.* If the Borrower, within a reasonable time after the completion of

the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between 30 per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

9. *Grant Advances.* At any time after the execution of this Agreement the Government may, upon request of the Borrower, if in the judgment of the Administrator the circumstances so warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of 30 per centum of the cost of the labor and materials to be employed upon the Project, as estimated by the Administrator.

10. *Deposit of Bond Proceeds and Grant; Bond Fund; Construction Accounts.* The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 8 PART ONE, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly

upon receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 7, PART ONE, hereof, promptly upon the receipt of such proceeds or payments in a separate account or accounts (each of such separate accounts herein called a "construction Account"), in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator.

11. *Disbursement of Monies in Construction Accounts and in Bond Fund.* The Borrower shall expend the monies in a Construction Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and as shall have been approved by the Administrator. Any monies remaining unexpended in any Construction Account after the completion of the Project which are not required to meet obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be

used solely for the purpose of paying interest on and principal of the Bonds.

12. *Other Financial Aid from the Government.* If the Borrower shall receive any funds (other than those received under this Agreement) directly or indirectly from the Government, or any agency or instrumentality thereof, to aid in financing the construction of the Project, to the extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

13. *Construction of Project.* Not later than upon the receipt by it of the first Bond payment, the Borrower will commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, plans, drawings, specifications and construction contracts which shall be satisfactory to the Administrator, and under such engineering supervision and inspection as the Administrator, may require. Except with the written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage, or any conditional sale or title retention agreement.

14. *Information.* During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction, cost and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower as the Administrator or any such purchaser may at any time reasonably require.

15. *Representations and Warranties.* The Borrower represents and warrants as follows:

(a) *Litigation.* No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the security therefor, the construction of the Project, or the financial condition of the Borrower; Except An action instituted and now pending in the United States District Court for the District of Idaho, Northern Division brought by the Washington Water Power Company, a corporation against the City of Coeur d'Alene, pleadings of which are herewith enclosed.

(b) *Financial Condition.* The character of the assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of such assets or in such financial condition except such

changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(c) *Fees and Commissions.* It has not and does not intend to pay any bonus, fee or commission in order to secure the loan or grant hereunder;

(d) *Affirmation.* Every statement contained in this Agreement, in the Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government is correct and complete, and no relevant fact materially affecting the Bonds, the security therefor, the Grant or the Project, or the obligations of the Borrower under this Agreement has been omitted therefrom.

16. *Bond Circular.* The Borrower will furnish all such information in proper form for the preparation of a Bond Circular and will take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 per centum of the Bonds may reasonably request to aid in the sale by the Government or such purchaser or purchasers of any or all of the Bonds.

17. *Expenses.* The Government shall be under no obligation to pay any costs, charges or expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement including, without limiting the generality of the foregoing, the cost of preparing, executing and delivering the Bonds, and any legal, engineering and accounting costs, charges or

expenses incurred by the Borrower.

18. *Waiver.* Any provision of this Agreement may be waived or amended with the consent of the Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement.

19. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise thereupon.

20. *Validation.* The Borrower hereby covenants that it will institute, prosecute and carry to completion in so far as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder a letter from the Governor of the State stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities or irregu-

larities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

21. *Naming of Project.* The Project shall never be named except with the written consent of the Administrator.

22. *Undue Delay by the Borrower.* If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for an unreasonable time in carrying out any of the duties or obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

23. *Conditions Precedent to the Government's Obligations.* The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) *Financial Condition and Budget.* If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) *Cost of Project.* If the Administrator shall not be satisfied that the Borrower will be able to

complete the Project for the sum of $650,000, or that the Borrower will be able to obtain, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall estimate to be necessary to complete the Project;

(c) *Compliance.* If the Administrator shall not be satisfied that the Borrower has complied with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) *Legal Matters.* If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the construction of the Project;

(e) *Representations.* If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect;

(f) *Maturity of Bonds Sold to Government.* If, in the event that some of the Bonds are sold to purchasers other than the Government, the maturities of the remaining Bonds are not satisfactory to the Administrator;

(g) Unless and until the Borrower shall prove to the satisfaction of the State Engineer that the proposed source of water supply is suitable, both as to quantity and quality of water; and that it is necessary and desirable to abandon the present use of water from Lake Coeur d'Alene;

(h) Unless and until the Borrower shall furnish evidence satisfactory to the Administrator that the Washington Water Power Company can be legally required to furnish water and electric services on day to day basis to the Borrower and to customers contemplated to be served by the Project until the Borrower shall have completed the Project;

(i) Unless and until the Borrower shall adopt a rate and bond ordinance, satisfactory to the Administrator, in form, sufficiency and substance. Such ordinace shall, among other things, provide that:

(1) No donations, taxes, depreciation charges, or any other items of expense, except normal operating expenses and maintenance, together with water, lighting and power line extensions, shall be charged against the revenues of the Project;

(2) All municipally used water and electrical energy shall be paid for at current selling rate schedules, except water used in fighting fire, and a reasonable rate shall be paid for hydrant rental,

all such payments to be made, as the service accrues, from the general funds of the Borrower into the funds of the Borrower's water and electric departments.

24. *Use of Diesel engine power plant.* The Borrower hereby covenants that at such time as electrical energy shall be made available from the Government power project at Grand Coulee, State of Washington, at rates such that the cost thereof to the Borrower shall be less than the cost thereof delivered from the Diesel engine generating plant to be constructed as a part of the Project, the Borrower will thereupon and thereafter cease active operation of such Diesel engine power plant and place it on a standby basis only, and will purchase all of its electrical energy requirements from the said Governmental power project at Grand Coulee, Washington. It is hereby specifically recited that the foregoing covenant is a material consideration for the execution of this Agreement on behalf of the Government and for the loan and grant to be made as set forth herein.

PART TWO

IN CONSIDERATION OF THE GRANT, THE BORROWER COVENANTS THAT:

1. *Construction Work.* All work on the Project shall be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the administration of the Act. The following

rules and regulations as set out in Bulletin No. 2, Non-Federal Projects revised March 3, 1934, entitled "P. W. A. REQUIREMENTS as to BIDS, CONTRACTORS' BONDS, AND CONTRACT, WAGE, AND LABOR PROVISIONS AND GENERAL INSTRUCTIONS as to APPLICATIONS AND LOANS AND GRANTS", with all blank spaces filled in as provided in said Bulletin, shall be incorporated verbatim in *ALL CONSTRUCTION CONTRACTS* for work on the Project. (Particular care should be taken that in all such construction contracts *the following words* are inserted in the blank space in Paragraph 3 (a) (1): the City of Coeur d'Alene and/or Kootenai County

and *the following words* are inserted in the blank space in Paragraph 3 (a) (2): the State of Idaho).

"1. (a) *Convict labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project.

"(b) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government engineer, no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week: Provided, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the

succeeding 20 days.

"(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

"2. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. Such wages shall in no event be less than the minimum hourly wage rates for skilled and unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done, viz:

Skilled labor.....
Unskilled labor.....

"(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: Provided, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

"(c) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed "unskilled laborers."

"(d) The provisions of this contract relating to hours and minimum wage rates for labor directly em-

ployed on the project shall for the purposes of this contract, to the extent applicable, supercede the terms of any code adopted under Title I of the act permitting longer hours or lower minimum wage rates.

"(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government engineer, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: Provided, however, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical aid insurance, in such amounts as are authorized by the laws of..... to be paid by employees, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

"(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and ac-

curate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the engineer inspector shall be furnished with a sworn statement thereof on demand.

"(g) The Board of Labor Review (herein called the "Board") shall hear all labor issues arising under the operation of this contract and such issues as may result from fundamental changes in economic conditions during the life of this contract.

"(h) The minimum wage rates herein established shall be subject to change by the Administrator on recommendations of the Board. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in paragraph 2 (a), (b), and (c) hereof) all contracts for work on the project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost, or decreased in an amount equal to such decreased cost.

"(i) Engineers, architects, and other professional and subprofessional employees engaged in duties normally done at the site of the project shall receive at least the prevailing rates for the various types of service to be rendered, provided that in no case shall professional employees receive less than the following weekly com-

pensation for 40 hours or less irrespective of the number of hours employed: $36.00 in the northern zone; $33.00 in the central zone; and $30.00 in the southern zone. Where the working week is longer than 40 hours, weekly compensation shall be increased proportionally. Compensation under this paragraph shall be subject to the approval of the Government engineer.

"3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivision and/or county) .....and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or district) .....: Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

(b) *Employment services.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: Provided, however, That union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured

in the customary ways through recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union workers by the union locals which are authorized to furnish such labor residing in the locality within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the labor preferences provided in section (a) of this paragraph 3 shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

"(c) *Compliance with Title I of the Act.*—The following sections 7 (a) (1) and 7 (a) (2) of Title I of the Act shall be observed:

> "(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employees and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from

joining, organizing, or assisting a labor organization of his own choosing.

"4. *Human labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

"5. *Compensation insurance.*—Every employer of labor shall provide, if permitted by the laws of..... adequate workmen's compensation insurance for all labor employed by him on the project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Government engineer shall be given. Where it is not permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided by which the employees may, by paying the entire amount of the premiums, derive a similar protection.

"6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and

such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

"7. *Withholding payment.*—Under all construction contracts, ...(The borrower).....may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

"8. *Accident prevention.*—Reasonable precautions shall at all times be exercised for the safety of employees on the work and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment and other physical hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction of the Associated General Contractors of America, unless and to the extent that such provisions are incompatible with Federal, State, or municipal laws or regulations.

"9. *N. R. A. Compliance.*—The contractor shall comply with each approved code of fair competition to which he is subject, and if he is engaged in any trade or industry for which there is no approved code of fair competition, then as to such trade or industry with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act (President's Re-

employment Agreement), and.....(The borrower)..... shall have the right, subject to the approval of the Government engineer, to cancel this contract for failure to comply with this provision and make open market purchases or have the work called for by this contract otherwise performed at the expense of the contractor. So far as articles, materials or supplies produced in the United States are concerned, no articles, materials or supplies shall be accepted or purchased for the performance of the work nor shall any subcontracts be entered into for any articles, materials or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials or supplies, and/or in case there is no approved code for the whole or any portion thereof then to that extent with an agreement with the President as aforesaid.

"10. (a) *Inspection of records.*—The Administrator, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Administrator, through his authorized agents, may require. The sub-

mission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

"(b) There shall be provided for the use of the engineer inspector such reasonable facilities as he may request. In case of dispute the Government engineer shall determine the reasonableness of the request.

"11. *Reports.*—Every employer of labor on the project shall report within 5 days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours work, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to be furnished to the Government engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also furnish to .....(The borrower)..... to the Government engineer and to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

"12. There shall be provided all necessary services and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government engineer, such services shall be paid for in full

at least once a month and such materials, tools, implements, and appliances shall be paid for at least once a month to the extent of 90 percent of the cost thereof to the contractor, and the remaining 10 percent shall be paid 30 days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

"13. *Signs.*—Signs bearing the legend Public Works Project No. ..... shall be erected in appropriate places at the site of the project.

"14. All reasonable rules and regulations which the Public Works Administration may prescribe toward the effectuation of the matters covered by paragraphs 1 to 13, inclusive, shall be observed in the performance of the work.

"15. *Subcontractors.*—(a) Appropriate provisions shall be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting such subcontractor, particularly paragraphs 1 to 14, inclusive.

"(b) No bid shall be received from any subcontractor who has not signed U. S. Government Form No. P. W. A. 61, revised (March 1934).

"16. *Termination for breach.*—In the event that any of the provisions of paragraphs 1 to 15, inclusive, of this contract are violated by the contractor under the construction contract or by any subcontractor under any subcontract on the work, ...(The borrower)..... may,

subject to the approval of the Government engineer, and upon request of the Administrator, shall terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within 10 days after the serving of such notice such violation shall cease, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination ....(The borrower).... may take over the work and prosecute the same to completion or otherwise for the account and at the expense of the contractor and/or such subcontractor, and the contractor and his sureties shall be liable to....(The borrower).... for any excess cost occasioned ....(The borrower).... in the event of any such termination, and ..... (The borrower)..... may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work, and necessary therefor. This clause shall not be construed to prevent the termination for other causes provided in the construction contract.

"17. *Definitions.*—The term "Act" as used herein refers to the National Industrial Recovery Act. The term "Government engineer" as used herein shall mean the State engineer (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "engineer inspector" as used herein refers to State engineer inspectors, resident and assistant resident engineer inspectors, and supervising engi-

neers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work."

2. *Restriction as to Contractors.* The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor, who has not signed U. S. Government Form No. P. W. A. 61, revised March, 1934.

3. *Bonds and Insurance.* Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, or materialmen, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide public liability insurance in an amount satisfactory to the Administrator.

4. *Force Account.* All construction work on the Project shall be done under contract, provided, however, that if prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement to the contrary notwithstanding, to apply to the Administrator for permission to do all or any part of the Project on a force account basis.

This Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by

the Borrower. This agreement shall be governed by and be construed in accordance with the laws of the State. If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the validity and effectiveness of any other provision of this Agreement or the rights or obligations of the parties hereto, provided, however, that in the opinion of the Administrator, the Agreement does not then violate the terms of the Act.

IN WITNESS WHEREOF, the Borrower and the Government have respectively caused this Agreement to be duly executed as of

City of Coeur d'Alene.

By .....

.....

SEAL:

ATTEST:

.....

.....

UNITED STATES OF AMERICA

By .....

Federal Emergency Administrator of Public Works.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

STIPULATION.

The Washington Water Power Company, a corporation,

Plaintiff,

vs.

City of Coeur d'Alene, Idaho, a municipal corporation; J. K. Coe, Mayor; A. Grantham, Treasurer; William T. Reed, Clerk; Lee Stoddard, Otto Gladden, Frank H. Lafrenz, Joseph Loizel, O. M. Husted, Cassius Robinson, S. H. McEuen and C. C. Hodge, members of the City Council of said City of Coeur d'Alene, Idaho, and Harold L. Ickes, as Federal Emergency Administrator of Public Works,

Defendants,

We, the undersigned attorneys for the defendants, except the defendant Harold L. Ickes, Federal Emergency Administrator of Public Works, do hereby accept service of the foregoing amended bill of complaint,

and consent to the entry of an order by the above entitled court permitting and directing the filing thereof.

C. H. POTTS
W. B. McFARLAND
Attorneys for Defendants.

(Title of Court and Cause)

AFFIDAVIT

Filed November 20, 1934.

STATE OF IDAHO)
County of Kootenai) ss.

RICHARD McKAY, being first duly sworn, upon his oath, deposes and says:

That he is an electrical engineer by profession; that he graduated from Whitman College with the degree of Bachelor of Arts and from the engineering school of Columbia University with the degree of Electrical Engineer; that he has been engaged in the active practice of his profession since the year 1921 in the states of Idaho and Washington; that he has been in responsible charge of the electric design of power plants, has designed a relay system which is in use by the plaintiff company, has engaged in research of loads and the development of power and research in the problems of rate making and costs; that for eighteen months during

said period he was manager of the Washington Water Power Company at Coeur d'Alene and was in charge of the distribution system in said city; and affiant is generally familiar with the plants, transmission lines and distribution systems of The Washington Water Power Company.

The Washington Water Power Company owns a hydro-electric power plant with controlling works situated on the Spokane River at Post Falls, Idaho, about ten miles from Coeur d'Alene; said plant was constructed about 1904 and 1905 and has operated continuously since the year 1906; The Washington Water Power Company is also the owner of several hydro-electric power plants situated on the Spokane River in the State of Washington.

The power plants of the plaintiff are connected by transmission lines for the purpose of affording continuity of service to the many customers of plaintiff; the power transmission lines of plaintiff extend into the counties of Kootenai, Shoshone, Bonner, Latah, Nez Perce, Benewah, Clearwater, Idaho and Lewis in said State of Idaho and plaintiff furnishes electric power for practically all uses in said counties; plaintiff has ample developed power capacity and facilities to serve all persons and uses now being, or reasonably to be anticipated, for many years in the said counties of northern Idaho.

The power plants, transmission lines and other facilities are modern and efficient and plaintiff renders and

has rendered an efficient, superior and completely adequate electric utility service in the districts covered by its lines in Idaho.

Plaintiff has acquired and owns light and power distribution systems in various cities and villages of northern Idaho, and in each of said cities and villages it renders electric light and power service to the inhabitants and in addition thereto to the districts and territory adjacent and tributary to said municipalities; the uses to which plaintiff's power is devoted are divers in character—power being furnished for domestic and commercial purposes and for all industrial purposes in said district; power is also distributed and sold for pumping water for irrigation, for mining and smelting uses and for transportation.

Preferred stock of the plaintiff has been sold in northern Idaho to consumers, employees and other citizens; more than 200 citizens of the City of Coeur d'Alene alone are owners of the preferred stock of the plaintiff.

About the year 1930 plaintiff purchased the electric power and distribution system in the City of Coeur d'Alene and has since owned and operated the same.

The Company holds franchise granted by the City which expires in 1953, a copy of the said franchise being attached to the complaint.

Since acquiring said distribution system plaintiff has expended more than the sum of $33,000.00 in improving and reconstructing said system and in improving

the facilities thereof, and the sum of $27,000.00 for the installation of new transformers to insure continuity of service. The electric service is supplied over a high tension line of high dependability; on the west, the line is connected with the main transmission system of the company, and on the east, it is connected with a second main transmission line of the company, which line is connected with the general power transmission line of Montana Power Company for added assurance of service; and in this way, reliable and continuous service is provided from two major sources.

The distribution system in Coeur d'Alene is adequate for all demands which have been made upon it or which may reasonably be anticipated, and can be added to at any time an additional demand arises. The service has been of high quality and reliability.

The rates charged for electric service were fixed by the Public Utilities Commission of Idaho in 1922 after a valuation and rate hearing, and have remained in effect since said date except that plaintiff has, in the four years since it acquired said distribution system, made and put into effect four reductions in different rate schedules, which rate reductions aggregated $11,400.00 annually. The rates so fixed in 1922 by the Public Utilities Commission and the valuation of the said property were reviewed by the supreme court of the State of Idaho and the order was by that court affirmed.

The plaintiff furnishes electric service to all classes of customers in the City of Coeur d'Alene numbering

2377 and in addition furnishes electric service to approximately 332 additional customers residing outside the city limits and in territory adjacent to the said city; plaintiff supplies all of the electric light and power sold and distributed in said City of Coeur d'Alene; in addition, plaintiff serves other uses and customers in the County of Kootenai, chiefly, irrigation pumping districts situated tributary to the City of Coeur d'Alene. The irrigation districts are dependent upon cheap power and it has been the policy of the State of Idaho to reduce to the lowest possible figure the cost of power to said irrigation districts. The City of Coeur d'Alene benefits largely from said irrigation development. The business of the plaintiff in serving such various and divers uses in relatively large towns, in smaller villages and communities, in rural districts, in electric service to farms, in pumping water for irrigation, in industrial service and in the operations of mines, mills and smelters, is such that each class of business lends substantial aid to the ability to carry on and serve the others. It is impossible to withdraw service from any one class without substantial impairment of plaintiff's ability to serve the others at existing rates.

The taxes paid by plaintiff in the year 1933 upon its electric generating transmission and distribution systems amounted to the sum of more than $214,000.00, of which there was paid to the City of Coeur d'Alene for state, county and municipal taxes within said county, the sum of $66,547.94, and in addition thereto plaintiff paid, pursuant to the laws of the State of Idaho,

the sum of $10,855.74 to irrigation districts in said county, which it would otherwise have been required to pay to the state and its subdivisions, a total in Kootenai County of $77,403.68. The gross electric revenue received from customers in the County of Kootenai amounted to $148,333.16. In addition thereto plaintiff paid to the State of Idaho, on account of power generation in the county, a considerable sum of money under what is known as the "Kilowatt Hour Tax"; and plaintiff's taxes for 1934 to the said government will exceed $250,000.00.

Plaintiff's investment in the distribution system for the City of Coeur d'Alene, exclusive of power generating and transmission equipment, is more than the sum of $200,000.00.

Affiant is familiar with the ordinance referred to in the complaint providing for the incurring of a municipal indebtedness of $300,000.00 for the purpose of acquiring or purchase or construction of an electric power plant or lighting system. Affiant has read the application of the City of Coeur d'Alene to the Federal Emergency Administration of Public Works, together with the report of Franklin P. Wood attached thereto, for a loan and a gift or grant for the construction of said electric generating plant, distribution and street lighting system.

The application and engineer's report disclose that the purpose is to construct a Diesel power generating plant; it is stated that the total cost of the power plant,

distribution system and street lighting sysem is estimated at $337,580.00, of that sum the total cost of labor and materials is estimated at $276,512.19, the contractor's profit at $27,578.09, and the other costs and expenses of construction at $33,480.00.

Affiant has examined the said report of the engineer for the purpose of ascertaining what amount will be expended for labor in the construction of said Diesel plant and distribution system and finds that the total amount to be expended in labor in the construction of the entire electric power and distribution system is the sum of $29,672.75, plus a part of the labor to be used on the building to house said Diesel plant and pumps for city water system, the total amount of said building comes only to $6900.00.

Affiant further states that prior to the election to ratify or reject the said bond issue, Franklin P. Wood of Denver was employed by the defendant City to make a report outlining a plan and reporting as to the feasibility and cost of the municipal light and power system. On or about November 21, 1933 and prior to the election the report was released and publicity was given to it in the Coeur d'Alene press. Affiant attaches hereto photostatic copies of said report published in the Coeur d'Alene papers, to-wit: the Coeur d'Alene Press, a daily newspaper published at Coeur d'Alene, and the Kootenai County Leader, a weekly newspaper published at Coeur d'Alene, Idaho, owned and published by the defendant, J. K. Coe, mayor of Coeur d'Alene. Af-

fiant also attaches a communication published in the Kootenai County Leader on December 8, 1933 signed by the defendant, S. H. McEuen, chairman of the fire, light and water committee of the City of Coeur d'Alene, and an extract from a speech delivered by Franklin P. Wood of Denver at a public meeting in Coeur d'Alene and reported in the Kootenai County Leader on December 11, 1933.

Affiant states that the statement in the letter of the said McEuen "that a higher voltage on the primary side would mean hotter electricity for home uses" is inaccurate and misleading for the reason that the primary voltage on a properly designed distribution system is not the cause of low voltage on the service line of the customer. Affiant further states that there are just so many British Thermal Units in the kilowatt hour and if the system is adequate to deliver power and light, the customer can get just the number of kilowatt hours or British Thermal Units that he desires.

In the application of Coeur d'Alene and in the report of the said engineer attached thereto, it is assumed that an adequate and reliable Diesel electric generating plant could be constructed for $152,955.72, exclusive of overhead, contractor's profit and building to house the plant. The sum is inadequate to furnish the generating plant to supply 80% of the electric power and light load, including 80% of the water pumping load in Coeur d'Alene. To supply 80% would require an expenditure for such Diesel plant, exclusive of such over-

head, contractor's profit and building to house the plant, of the sum of $181,900.00. The report and application further in one place estimates a load of 80% and in another place a total customer list of 2600, which is in excess of the number of customers plaintiff has in the city at this time and more than it has ever had. A Diesel power plant adequate to serve 2600 customers or to supply the said entire city would require four Diesel instead of three, and an expense of not less than $230,000, exclusive of overhead, contractor's profit and building.

In the said report it is assumed and stated that an adequate electric distribution system could be built for the service of said City for $102,632.18, exclusive of contractor's profit and overhead. The report fails to provide for service in two sections of the City, the cost of which is estimated at $16,000.00, and for other scattered customers within the City and along and near to its boundaries. The said two sections are described as follows: (a) the northwest part of the city lying west of Government Way and north of Linden Avenue; (b) the northeast part of the city lying between Fifteenth and Seventeenth Streets and north of Garden Avenue. Within said districts "a" and "b", so omitted and for which service is not provided, plaintiff is now serving 115 electric customers, and approximately 25 in the other scattered areas referred to. It would cost additional money for the City to extend its plant to

serve said scattered customers above refered to.

Affiant says that the distribution system of the type proposed in the engineer's report for the City could not be constructed for less than $136,500.00, exclusive of overhead, contractor's profit and building. Affiant says that taking the contractor's profit, overhead and expense set up in the report of said Engineer Wood together with a Diesel plant of three units and with a distribution system providing for service to 80% of the customers, the cost would exceed $400,000.00, and an adequate Diesel engine plant and distribution system for service to the entire City, with four units, would cost more than $450,000.00.

Affiant says that the estimate of the expense of generation assumed in said report is unreasonably low and below the actual cost necessary to be incurred. Among other things, the amount of fuel oil is computed upon the basis of guaranteed efficiency of the engines instead of expected efficiency—the guaranteed efficiency being that obtained by test runs when the machines are new, and the expected efficiency is the efficiency which may be expected from the machines over a period of years. The cost of fuel oil is estimated and assumed to be 6c per gallon, whereas the cost is actually 6.91c per gallon and may well go higher.

No adequate provision is made to care for and provide free porch lights promised in the communication of Mr. McEuen, which would take approximately 250,000 kilowatt hours per annum.

In affiant's judgment the report fails to take into proper consideration contingencies of competition, possibilities of higher oil costs, of fire, accidents, injuries and to make proper allowance for maintenance and lubricating oil.

Affiant further says that the report assumes and states that inasmuch as 80% of the customers had signified their willingness to buy service from a city-owned system the figures used by the engineer were computed upon the assumption that 80% of the gross business could be obtained by the municipal plant. The report prior to the election further assumed that the gross revenues from electricity in the City would amount to $120,000.00, and the City would receive 80% thereof or $96,000.00. And further assumed that 2,500,000 kilowatt hours per annum would be required for electrical service and 1,110,000 kilowatt hours per annum for pumping water.

Affiant does not know the names of the 80% of the signers refered to, but from his acquaintance with Coeur d'Alene and the electric use in said City, he does not believe that they represent in excess of 40% of the electric energy used by consumers in the City of Coeur d'Alene.

In the report made in December, 1933 and attached to the application of the City to the Federal Emergency Administration of Public Works, something over a month after the previous report, the same engineer

Wood assumes (based upon the same 80% of the gross consumption being purchased from the municipal plant) a consumption of electric current by revenue-producing customers within the city of 3,000,000 kilowatt hours per annum, at an average of 3c per kilowatt hour, a total of $90,000.00, which includes the water pumping. It is further stated that the estimate of future operations takes into consideration 2600 customers by the year 1935. Said report then estimates that the amount to be paid for pumping water would be $12,800.00 per annum, and the electric power required 750,000 kilowatt hours per annum, which amounts to 1.7c per kilowatt hour (given in said report at 1.6c). This would leave for sale to consumers within the city 2,250,000 kilowatt hours per annum, which would be required to produce the balance of the revenue estimated of $90,000.00 or $77,200.00 per annum, an average cost to the consumer of 3.43c per kilowatt hour.

The affiant has caused an investigation to be made and plaintiff now receives in Coeur d'Alene an average of 3.33c per kilowatt hour, exclusive of power used for water pumping.

Any figures based upon a 100% customer load in Coeur d'Alene would require four Diesel Units of the same rating as proposed by the Engineer Wood in order to give adequate service. In the engineer's report it is further stated that the operating costs assumed were based upon a 100% customer load but in the operating cost of the power plant as shown in the report

attached to said application the fuel consumption is based upon 3,500,000 kilowatt hours, which is, according to the first report, adequate only for 80% of the electrical energy used by customers in Coeur d'Alene, so that the statement that in calculating the operating costs it is assumed that the plants are supplying a 100% customer load when as a matter of fact it is based upon either a 75% or 80% customer load as shown by the estimated operating cost of the power plant in the engineer's report is in error.

Affiant gives it as his opinion that a Diesel power plant and distribution system adequate and sufficient to give service to the City of Coeur d'Alene would require an outlay of more than $450,000.00.

Affiant further says that it is impossible to ascertain from the report or application just how much labor will be employed in the construction of said electric plant and distribution system but that the total moneys to be paid therefor, exclusive of the labor for the building to house the Diesel plant and pumping plant, is slightly in exces of $29,000.00. Affiant further says that at present the electric distribution system of the plaintiff in Coeur d'Alene and its water system in Coeur d'Alene give employment to twenty-four people. From an examination of the report of Mr. Wood upon which the cost of operation is based, it appears that about ten men will be employed by both systems and some additional money spent for maintenance but that it is not contemplated to employ as many people as is now given

employment by the plaintiff so that it will result in ultimately reducing employment. The result will be that certain employees of the Washington Water Power Company will of necessity be discharged.

Affiant further says that he has read Release No. 898 dated September 27, 1934, of the Federal Emergency Administration of Public Works, and set forth in full in the complaint. Affiant says that the policy announced therein, to-wit: that the Public Works Administration will make it a practice before approving any such municipal loan to give the public utility company an opportunity to put into effect rates at least as low as proposed by the municipal system has not been given with respect to the application of the City of Coeur d'Alene, as affiant believes it is obvious from the application for said loan and grant made to the said City that the City did not contemplate thereby the putting into effect in said City of rates for electric service lower than those now being charged in said City by the plaintiff; as a matter of fact, as hereinbefore stated, the average rate now being received by the plaintiff is lower than the average cost to the customers in said City proposed in the said application and the engineer's report attached thereto.

Affiant further says that on November 7, 1934 Frank T. Post, President of The Washington Water Power Company, sent a telegram to Honorable Harold L. Ickes, Public Works Administrator, a copy of which is as follows:

"SPOKANE, WASHINGTON
NOVEMBER 7, 1934

HON. HAROLD L. ICKES
PUBLIC WORKS ADMINISTRATOR
WASHINGTON D C

Congressman White of Idaho has recently stated publicly that Public Works Administration has approved application City of Coeur d'Alene Idaho for loan and grant to be used for construction Diesel engine electric generating plant and distribution system in competition with our efficient hydro system stop Feel sure this application has not been called to your attention because its approval would violate statement of principles contained in Public Works Administration press release number nine eighty nine dated September twenty seventh nineteen thirty four stop Our present rates in Coeur d'Alene are among the lowest in the United States and regulated by Idaho Public Utilities Commission stop Application of the City of Coeur d'Alene for loan and grant which we had an opportunity to answer does not contain any schedule of rates which City purposes to put in force if PWA shall loan and give it money with which to build a system to operate in competition with our Company therein stop We have never seen any schedule of rates proposed by the City and it is impossible for the City to make this proposed project self-liquidating under schedules of rates lower than ours stop Construction of Diesel engine plant in Coeur d'Alene at this time would seem to violate all the

principles contained in your press release and in other releases of the PWA not only because of the situation outlined above but also because there is at the present time in this territory a large surplus of hydro generated electric energy which will be greatly augmented by the Government through the Grand Coulee development Stop Feel sure you have no intention to depart from previously announced policies and that Coeur d'Alene application will not be granted Stop Shall greatly appreciate assurance that this situation will be given your personal attention and I will esteem it a privilege to have the opportunity of a personal interview and discussion of whole problem with you.

F. T. POST PRESIDENT
THE WASHINGTON WATER
FTp-w POWER COMPANY"

In reply to the above telegram Mr. Ickes sent the following:

"C 47 58 GOVT WASHINGTON DC NOVEMBER 12

F T POST
PRESIDENT THE WASHINGTON WATER POWER CO SPOKANE WASHN

RETEL SEVENTH DOCKET 6695 COEUR DALENE CITYS PROPOSED ELECTRIC RATES CONTEMPLATE TWENTY PERCENT REDUCTION STOP PROPOSED WA-

TER DEEMED BETTER QUALITY THAN YOURS STOP YOU HAVE ALREADY HAD OPPORTUNITY MEET CITYS PROPOSALS HOWEVER IF YOUR COMPANY PLACES IN EFFECT RATE REDUCTION EQUAL OR GREATER THAN THAT OF CITY ELECTRIC POWER BOARD OF REVIEW WILL CONSIDER MATTER FURTHER

HAROLD L. ICKES ADMINISTRATOR"

And on November 15th Mr. Post replied to Mr. Ickes as follows:

"SPOKANE WASHINGTON
NOVEMBER 15, 1934

HON. HAROLD L. ICKES
PUBLIC WORKS ADMINISTRATOR
WASHINGTON D C

Retel twelfth docket six six nine five Coeur d'Alene in the campaign before the election authorizing bond issue it was not asserted by the city officials or other proponents that if the City should be authorized to go into the electric business there would be any lowering of rates stop It may seem strange to you but the fact is that city officials of Coeur d'Alene at a meeting with the Public Utilities Commission of Idaho stated to that Commission in my presence that they were not interested in any reduction in electric rates but only in municipal ownership stop The original papers filed by Coeur

d'Alene with your Department for a loan and grant did not contain any offer or proposal that there would follow any reduction in electric rates stop We were given a copy of this application and answered it in accordance with its terms stop Several weeks after the Idaho local board had made a report to Washington Mister Coe the Mayor of Coeur d'Alene went to Washington and had a conference with someone unknown to us stop We are not advised as to what he said and we have no copy of any document or paper if any filed by him stop Yesterday we communicated with Mayor Coe and he says that he filed no writing on that subject and that he did have some conversation with some party whose name he refuses to give us and that what was said about reduction of rates he states he does not remember stop Mayor Coe had no authority from the city government to make any representation or proposal on that subject stop We think it is only fair that we should have a copy of any writing or memorandum if any now in this file which relates to any suggestion or proposal for a reduction in rates stop As pertinent to this subject we further suggest the following facts namely of the gross electric revenue received by our Company from electric service rendered in the State of Idaho over eighteen percent is paid back to the people in the form of federal, state county city and other taxes stop The municipalists do not purpose to pay any taxes to the Federal Government nor any state county or school district taxes or any moneys in lieu thereof stop What they may do in the matter of city bookkeeping in the way of shifting from one fund

to another is purely a matter of speculation stop The proposed municipal plant does not cover the entire City but deliberately omits not only a portion thereof within the City limits but also a portion thereof just outside of the city limits in which sections we have over three hundred electric customers stop In other words the municipalists seek to corral the best part of the business and leave the poorest part to this company stop Even this proposed plant cannot be built with the amount of money asked for and to create a plant or a system which would cover the entire territory would materially increase the shortage stop This section of the northwest has been widely advertised for its water power developments and potential developments stop This Company has six hydro plants on the Spokane River one of them being only ten miles from Coeur d'Alene stop The Federal Government is spending many millions in developing two hydro plants in the Columbia River stop The contractors for the Grand Coulee Dam who certainly know their business have built a transmission line from the dam site to Coulee City and entered into a firm contract with this company for all of the electric power needed in that enterprise stop There can be no doubt that these contractors knew all about Diesel engine plants stop That under these circumstances a bureau or board of the Federal Government should seriously consider a proposal to finance and subsidize a Diesel engine electric system in Coeur d'Alene is most surprising stop The rates of our company prevailing in this section are among the lowest in the United States and were so de-

termined by investigators for the Federal Trade Commission stop Pursuant to order of Department of Public Works of the State of Washington this company has been diligently engaged for several months in making a complete detailed inventory of all of its property in the states of Washington and Idaho stop This inventory is now completed and is being checked by engineers and other employes of said department stop In the near future a trial or hearing will be had before said department in which we expect the Public Utilities Commission of Idaho will participate to determine the fair value of all of the electric property of this company and also to determine the reasonableness of all rate schedules stop The rate schedules in each state for comparable cities towns and communities and for agricultural service must of necessity be substantially the same stop Our company is controlled by state laws and by administrative and judicial bodies created by state legislatures stop The law provides that its rates shall be fair just reasonable adequate and non discriminatory and there are severe penalties for violations thereof stop Our Company of course cannot make any binding contracts which might attempt to override or usurp the functions of state regulatory bodies stop We are advised by our lawyers that the Public Works Administrator has no power or authority under the law to make any loan or grant to Coeur d'Alene for the purpose of constructing a Diesel engine electric system stop We make this statement for the purpose of not waiving this point in any litigation that may ensue hereafter if there should be

any such litigation stop As to the contention in the matter of the water system that the proposed water is deemed of better quality than the water that is furnished by us from that great and beautiful lake we beg to state that the record in your files will show that the proponents do not know where they can get this better quality of water stop The suggestion seems to be that they may sink one or several wells but how many and where and the quantity and quality of water obtained therefrom is purely speculative stop The water from the lake furnished by our company has been held to be wholesome and potable in accordance with the standards of the United States Bureau of Health stop Permit me to point out in conclusion that if the City of Coeur d'Alene should construct and operate the proposed system in competition with our company the inevitable result will be that each system will lose money and that the City of Coeur d'Alene now in a precarious financial situation will become bankrupt

F T POST PRESIDENT
THE WASHINGTON WATER
POWER COMPANY"

FTP-W
POSTAL
CHG WWP CO

RICHARD McKAY

Subscribed and sworn to before me this 20th day of November, 1934.

F. MEADE
Notary Public for the State of

(Seal) Idaho, residing at Coeur d'Alene, Idaho.

C. d'A. Press
Nov. 21, '33
Kootenai County Leader
Nov. 21, '33

ENGINEERS REPORT ON WATER AND POWER

Franklin P. Wood, Denver Authority on Water and Power Construction, Summarizes The Situation in Coeur d'Alene

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Franklin T. Wood, Civil Engineer of Denver, Colorado, called here recently by the city, to investigate and make an appraisal of the water system supplying Coeur d'Alene with water, made a voluminous report covering values of the present system and requirements for a new system together with much valuable data concerning the same.

Mr. Wood's was here about two years ago doing preliminary investigating for the city administration, at that time. Mr. Wood's report covers the appraisal; and the engineer in his estimate figured that securing government funds at the rate of 4% interest on 70% of the total would mean that the water system would

pay out in something under 10 years. If however, it was necessary to secure the money thru sales of bonds to private bankers at a higher rate of interest, would then take, according to his estimate, in excess of 15 years to pay out. But either would pay out.

"Unquestionably," says Mr. Wood, "the proper thing to do, if it could be done, would be to purchase both the water and the electric system from the Washington Water Power Company, the present owners; but it is understood that the company will not willingly sell its electric system, therefore, the city would be faced with the necessity, if it decides on municipal ownership of both departments, to construct entirely new electric and water systems, and inasmuch as the present company has a franchise which is good for a number of years yet, it would be necessary to enter into competition with the company." Continuing Mr. Wood's says:

"Under these conditions, we would recommend the construction of wells, a Diesel Engine power plant and electric distribution system and new water distribution system. Using considerable care and assuming that prices will not advance materially in the near future, this would necessitate the issuance of approximately $600,000.00 General Obligation Bonds to be divided as follows:

Water plant & system	$300,000.00
Electric plant & system	300,000.00

"It is improbable that the city could secure all of the business of either of the systems to start with, but it is understood that some 80% of the people have sig-

nified their willingness to buy services from the city owned systems, and therefore the figures will be based on the assumption that 80% of the gross business is obtainable by the city. Exact figures are not obtainable, but best estimates indicate the following.

Gross revenue from electricity	$120,000.00
Gross revenue from water dept.	60,000.00
Total gross revenue	$180,000.00
Proportion city would expect to obtain	$144,000.00

The operation of the combined systems can be taken as follows:

Electrical services	2,500,000 kw.h.
For water pumping	1,110,000 kw.h.
Total	3,610,000

COSTS:

Oil for generating power 330,000 gal. at 6c per gal.		$19,800.00
Lubricating oil		2,000.00

OPERATORS:

1 Chief engineer	$3,000.00	
3 Operators	4,500.00	
1 Helper	1,500.00	
Total Labor		$ 9,000.00
Station Supplies		500.00
Maintenance: 1½% of cost		2,270.00
Total station operation		$33,570.00

OTHER EXPENSES:

General Manager	3,000.00
2 distribution men	3,600.00
1 truck	600.00
Meter reader	1,600.00
Auditing and bookkeeping	3,600.00
Water Maintenance man	3,000.00
Auto and truck expense	900.00
Maintenance	3,000.00
Misc.	1,700.00
Total	$21,000.00
Total operation of both systems	$54,570.00

"This leaves a net from operation of $80,430.00 with which to pay the interest and sinking fund on the outstanding bonds.

"In giving consideration to the acquisition of the Electric department by the city, the fact that the U. S. Government is now starting to build the Coulee Dam and Power Project, should be recognized. When built, it is the intention to the government to make cheap power available thruout the northwest. It is within the range of posibility for Coeur d'Alene to secure power when it is ready, but if it already has a Diesel engine plant, it will be in an advantageous position, because such engines are very satisfactory for standby purpose since they can start at a moments notice. On account of the long transmission line necessary to supply the load here, the engines would form a good talking point.

Every indication points to an increased amount of municipal ownership, and the sooner it is started here the greater will be the advantage. By carrying this plan out now, the government will have a good prospective customer, which in a way might obtain a loan for construction.

"It has been suggested that if the city builds a water and not an electric distribution, it might be possible to put in a smaller Diesel Plant for the purpose of furnishing the power for pumping and also for street lighting, at the same time furnishing some lighting service to the citizens. This would be a possibility, but it must be realized that pole lines would need to be put up all over the town which would cost almost as much as an entire new distribution system. This would increase the cost of the water system around $150,000 and would only permit an increase in gross business of $15,000 or $20,000 per year, and would not really be advisable, since only $150,000 more would be required for the entire system.

"The attached Tables No. 1 and 2 are made up for the purpose of indicating the relative value of obtaining the money from private and government sources. In either case it is assumed that the City would start out with approximately 80% of the business and build it up gradually until it had all of the load.

"WATER SUPPLY. All indications point to an increasing pollution of the lake water due to mill operations near the upper end. It also appears that con-

siderable difficulty is being experienced in keeping surface water out of the intake. When taken 90 feet below the surface as is being done now, it should be reasonably free from contamination, but at any event, it is and will be necessary to continue to treat it for bacteriological content. It would be quite impractical to take out lead and other mineral pollution.

"It seems desirable therefore to consider the use of wells, should the City take over the system separate from or in connection with the electric system.

"Numerous wells in the immediate vicinity indicate the presence of a large body of underground water which is at least as good as the lake water and much less subject to contamination.

"In order to check our conclusions, we had Mr. O. F. Zingraf of Spokane, who has had much experience in well drilling in Idaho, visit the various possible sites and he concurs in the conclusions herein stated, viz., that water in ample supply and of good quality can be obtained by sinking wells. It is probable that such wells would not need to be more than 125 feet deep and water would stand probably within 75 feet of the surface, making pumping costs comparatively inexpensive.

"LOCATION. The old mill site between the town and Tubbs Hill seems to be ideally located for installation of the electric plant and well system. It is on a railtrack, from which a spur could be inexpensively constructed and contains enough land to permit the construction of a building of pleasing appearance, sur-

rounded by lawns and parking to beautify the neighborhood; at the same time there is enough land for industrial plant sites should there be a demand created for them.

"The power plant would be built at the well site and a part of the building would cover it so that the one crew of men could operate both systems.

"However, before actually selecting this site some prospecting should be done for water. $500.00 spent in sinking test wells and investigating the water should enable the city to decide definitely on this point.

"In conection with the plant, we recommend a large reservoir on Tubbs Hill and probably an elevated storage tank in the north end of town to equalize the pressure.

"In conclusion, attention should be drawn to the fact many times pointed out before, that the city and people of Coeur d'Alene are paying for the water and light systems now, but not getting them. Even though it might be possible to only get a part of the business now there is no question but that the bonds will be paid out without the people being assessed anything in the way of taxes to pay therefore.

"In any undertaking of this nature, the interest charges are the principal cause of high rates. If the interest charges could be abolished the actual cost of operation would not be over $1.00 per month for water and 1½c per kilowatt for electricity for the ordinary household.

"The building of the system would put many men to work and be a material benefit in keeping people off of the charity list and it should be understood of course that local people should be employed in so far as possible, and local merchants patronized in the purchases."

Respectfully submitted,

FRANKLIN T. WOOD.

Leader, Dec. 8, 1933.

POSITION OF CITY EXPLAINED ON PLANT OWNERSHIP

Councilman McEuen Turns Light On Proposed Water And Electric Plants and Bond Issue

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The following communication to The Leader is published in full. It comes from a member of the city council, himself a former mayor of Coeur d'Alene, who has been closely allied with public life and the interests of the city for many years. In the present council Dr. McEuen is chairman of the light and water committee, and has taken an active part in promoting the proposed municipal ownership effort of Coeur d'Alene.

Mr. Editor:

I would like at this time to answer the questions that

have been asked, through the Press regarding "What the city council intends to do with the $600,000 bond issue they are asking the voters of this city for?"

It is our intention to build a water, light and power plant. The proceeds from which will be used for the benefit of the community. The question has been raised as to how the plant is to be paid for. The earnings of the plant will be used to pay off all bond indebtedness, by being transferred to the city treasury, then used to pay off the bonds or any other use that may arise. We have data that proves beyond all doubt that a municipal plant in Coeur d'Alene will pay its own way, and that it will not be necessary to raise one penny of taxes on property to pay off any portion of the $600,000 bonds. If the electric light and water business was a poor investment. Why would the United States government be lending aid to cities to acquire their utilities and why would private bonding houses offer to take the bonds as they already have in this particular case?

We intend to build a plant building of a very neat design to house the generating and pumping machinery, that will be a credit to our city, surrounded by a neat park . Three Diesel engines of the latest design, each driving a 500 K. W. A. C. generator with exciter and necessary switching and fuel oil equipment. Also a much larger and better designed electric distribution system, with a higher voltage on the primary side of the transformers, this will mean hotter electricity for home use. We intend to bring out street lighting (which we need

so bad) up to a class with other cities that own their power plants, street lighting that we citizens can be proud of. We intend to connect up all porch lights on the city side of the meter so that each residence can have a porch light all night; also retain the present street lighting system, this will improve our street lighting ten fold. Light is the greatest weapon known to cut down crime.

When the people jointly own their utilities they have no desire to exploit any citizen. This point is emphasized by the freedom that will be given the water users. Each consumer will be allowed to do necessary sprinkling at any time he or she sees fit. There will be no discrimination between residence, heretofore some residnts have been on a meter while their neighbor has not. There will be no residence water meters all consumers will be treated alike.

The water mains of the present system are much too small to adequately supply the amount of water a city of this size requires. The new system as planned is so designed and gridironed as to give a good supply in all parts of the city, much larger mains will be necessary in many places. In the new system there will be only 20 per cent of four inch mains. (Where with the present system, according to the underwriters map, there is 60 per cent four inch mains.) Two reservoirs are contemplated in this system a 2,000,000 gal. reservoir located at an elevation of 225 ft. and a 250,000 gal. elevated steel tank located in the north end of the city

on Locust street. This is to overcome the lack of pressure in that locality. The installation of the water and light systems will put many men to work, who will have to be residents of this city, preferably taxpayers.

Each property holder's water pipes will be connected directly to the city water mains without charge.

The matter of pure water has been given much consideration and in order to obtain pure water supply, it will be necessary to take it from deep wells.

Our engineer while here made a thorough investigation of the conditions of the water mains now in use in our city, by digging down to the water mains. He found the mains in excellent condition but it will be advisable to install new couplings if the city should purchase the present system from the power company. If purchased there will be the same amount of work as there would be if an entirely new system was installed. It is planned to place mains and poles in the alleys wherever possible.

The cost of an entirely new water system including well, pumping machinery, installation, buildings, electric generating machinery and equipment, distribution system is completely covered by the $600,000 appropriation.

A prosperous city can only be built upon cheap power. This plan will give this city power cheap enough so that it can make it an inducement to bring manufacturing to our city, enlarge the city's payroll, which will not only

help the home owner, but will also help the merchant, the landlord and pay grocery bills. This city has lost several such opportunities already by not having cheap power.

We councilmen have spent three years going over this matter, and have considered it very carefully. We own property and we do not feel that in any way are placing a mortgage upon it. We are confident that the plant will pay its way out, will reduce taxes, lower rates and pay into the city treasury a profit each year the same as other municipally owned plants are doing. The average profit made on municipally owned plants in cities of 2500 population is approximately $50,000 per year, up to and over $1,000,000 in large cities. Over 50.7 per cent of all power plants in the United States are municipally owned, there are over 2500 municipal plants. If any one who is in doubt will call at my office I will gladly show them a book showing just what profits the municipally owned plants are making throughout the United States.

Did it ever occur to you that from time to time you have been asked to vote obligation bonds such as for aviation field, street grading, curbing, paving, side walks, sewers, school bonds and for many other improvements? These bonds were a direct lien on your property, you had to dig down in your jeans to pay every cent of them. But when it comes to voting a bond issue that will pay for itself and also return a big profit to the tax payer, you immediately hear a big holler go up that "It

can't be done', It will raise my taxes." Did you ever stop to figure where this big noise came from? The private interests don't like to turn over to the taxpayers what rightfully belongs to them, the profits on the necessities of life, light, power and water.

If you wish in the future to have cheaper rates on water you should vote for both the electric and water bonds. If only the water bonds carry it will be necessary to purchase power from the power company for pumping. The only possible way to get cheap water is to own your electric generating plant then it will be possible to pump water at a very low cost. Many cities who own their own utilities make no charge for pumping. The electric department donates the power to the water department. The little city to the north of us, Bonners Ferry a little over 1,000 population, makes no charge for street lighting and no charge for pumping water for fire hydrant service.

Mr. Taxpayers, by establishing your plant and distribution system you will be in line to buy electricity from the government at Coulee Dam, cheap power and nothing else will build your city. The government is generating electric current at Muscle Shoals at a cost of 1 1-3 mills and is selling it to the Alabama Power Company for 2 mills a K. W. They retail it to the people at 16 cents a kilowatt. Our government has notified the cities that they can have it for 2 mills a kilowatt, if they will install their own distribution systems. Now are we going to be ready when the Coulee Dam is completed to get cheap power?

Vote these bonds and build a future for Coeur d'Alene city.

DR. S. H. McEUEN

Chairman, Fire, Light and Water Committee.

EXTRACT FROM TALK BY FRANKLIN P. WOOD, DENVER ENGINEER

From Kootenai County Leader, Dec. 11, 1933.

Now, let us take some rather specific figures. If you build a new distribution water system, new electric distribution system and new Diesel Oil Engine Power Plant, you can undoubtedly secure 30% as a gift from the government whether you sell your bonds to the government or to private investors. In case of the government, you would pay but 4% interest. If from private sources, probably 6%. In any event you would not have to borrow in excess of $500,000 to construct entirely new systems.

Suppose you went into competition with the Washington Water Power Company. You could undoubtedly get a large share of the load to start with. To carry the bonds will require at least 2-3 of the taxpayers voting for them. This means that you will have 2-3 of the load because they are not going to vote for it unless they want it. Then too, you will have better water and

your own system, and it would be a poor sort of a citizen who would not support his own project. Under these conditions we estimate that you will have a gross revenue from the electric department of at least $100,000 per year and from the water of $60,000 per year, or a total of $160,000. With a modern Diesel Power House and Well Water system, the expense of operation should not exceed $80,000 per year, which leaves a net from operation.

(Title of Court and Cause.)

MOTION

Filed November 20, 1934.

Comes now the plaintiff and moves the court for an injunction pendente lite in the above entitled cause, enjoining and restraining the defendants and each thereof, and their and each of their assistants, agents, employes and attorneys, and all persons acting through or under them, or any of them from proceeding with or making effective any act or transaction in connection with or in furtherance of the construction of a municipal electric generating plant and distribution system, or the financing thereof with Federal Emergency Administration of Public Works funds or gifts or grants, or from issuing, pledging, selling or delivering any bonds of the City of Coeur d'Alene which are purported

to be authorized by Ordinance No. 713, referred to in the complaint, or accepting, using or applying any moneys, the proceeds of any loan, grant or gift from the Federal Emergency Administration of Public Works for any of said purposes, and from the commission of any of the acts complained of in the complaint in said cause; and that this court issue an order to the defendants to show cause at a time and place to be fixed by this court why the said injunction should not be issued.

This motion is made upon the verified complaint filed herein and the affidavit of Richard McKay filed herein, together with the exhibits attached to said complaint and the said affidavit.

JOHN P. GRAY
W. F. McNAUGHTON
ROBERT H. ELDER

(Title of Court and Cause)

MOTION TO DISMISS

Filed December 8, 1934.

Now comes Harold L. Ickes, as Federal Emergency Administrator of Public Works, defendant herein, and moves the court to dismiss the amended bill of complaint filed in this case upon the ground that it does not state any matter of equity entitling the plaintiff to the relief prayed for, nor are the facts as stated suf-

ficient to entitle the plaintiff to any relief against the defendants.

WHEREFORE this defendant prays that the whole of said amended bill of complaint may be dismissed.

HENRY T. HUNT
as Special Assistant to the Attorney General, Attorney for Harold L. Ickes as Federal Emergency Administrator of Public Works.

J. A. CARVER
United States Attorney for Idaho.

E. H. CASTERLIN
Assistant U. S. Attorney for Idaho.

FRANK GRIFFIN
Assistant U. S. Attorney for Idaho.

(Title of Court and Cause.)

MOTION TO DISMISS AMENDED BILL OF COMPLAINT

Filed December 6, 1934.

Now comes the defendants above named, except the defendant Harold L. Ickes, Federal Emergency Administrator of Public Works, and move to dismiss the

Amended Bill of Complaint of plaintiff on file herein, upon the following grounds arising upon the face of said Amended Bill of Complaint, to-wit:

I.

That said Amended Bill of Complaint does not state facts sufficient to constitute a valid cause of action in equity in favor of the plaintiff and against these defendants or any of them.

II.

That the facts alleged in said Amended Bill of Complaint are insufficient to constitute a valid cause of action in equity or to entitle the plaintiff to equitable relief.

III.

That said Amended Bill of Complaint does not state any matter of equity entitling the plaintiff to the relief prayed for, nor are the facts therein stated sufficient to entitle the plaintiff to any relief against these defendants.

WHEREFORE, these defendants pray that said Amended Bill of Complaint be dismissed and that they recover their costs and disbursements herein expended.

W. B. McFARLAND,
C. H. POTTS,
Attorneys for defendants, except defendant, Harold L. Ickes, Federal Emergency Ad-

ministrator of Public Works,
Residence and P. O. Address,
Coeur d'Alene, Idaho.

(Service Acknowledged)

(Title of Court and Cause)

MOTION OF DEFENDANTS, EXCEPT DEFENDANT HAROLD L. ICKES, FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, TO STRIKE REDUNDANT MATTER FROM AMENDED BILL OF COMPLAINT

Filed December 6, 1934.

Now come the defendants above named, except the defendant, Harold L. Ickes, Federal Emergency Administrator of Public Works, and move the Court to strike from the Amended Bill of Complaint the portions thereof hereinafter designated, for the reason that the same are redundant, superfluous, sham and frivolous, and are not material to the alleged cause of action stated in said Amended Bill of Complaint, to-wit:

1.

All that part of Paragraph V, beginning with the words "said power plants" on page 4 of the Amended Bill of Complaint, and continuing to the end of said Paragraph V.

2.

All that part of Paragraph VII, beginning with the words "For the year 1934" in the fourteenth line of page 7, and continuing to the end of said Paragraph VII.

3.

All of Paragraph XII of the Amended Bill of Complaint.

4.

All of Paragraph XIII of the Amended Bill of Complaint.

5.

All of Paragraph XV of the Amended Bill of Complaint.

6.

All of Paragraph XVI of the Amended Bill of Complaint.

7.

All of Paragraph XVIII of the Amended Bill of Complaint.

8.

All of Paragraph XIX of the Amended Bill of Complaint..

9.

All of Paragraph XX of the Amended Bill of Com-

plaint.

W. B. McFARLAND
C. H. POTTS,
Attorneys for defendants, except defendant, Harold L. Ickes, Federal Emergency Administrator of Public Works, Residence and P. O. Address, Coeur d'Alene, Idaho.

(Service Acknowledged)

(Title of Court and Cause)

ORDER

Filed December 13, 1934.

In harmony with the memorandum opinion filed this date, it is ordered that the defendants' motions to dismiss are denied.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

ORDER

Filed December 13, 1934.

In harmony with memorandum opinion filed this date

motion of the defendants, City and its officers, to strike certain allegations from the bill is denied.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

OPINION

Filed December 13, 1934.

John P. Gray, W. F. McNaughton, Robert H. Elder, All of Coeur d'Alene, Idaho,

Attorneys for the plaintiff.

W. B. McFarland, C. H. Potts, of Coeur d'Alene, Idaho,

Attorneys for City of Coeur d'Alene, Officers and City Council of said City, Defendants.

Henry T. Hunt, Special Assistant to the Attorney General, Washington, D. C.

John A. Carver, District Attorney for Idaho; E. H. Casterlin, Assistant District Attorney for Idaho; Frank Griffin, Assistant District Attorney for Idaho, all of Boise, Idaho,

Attorneys for Harold L. Ickes, Federal Emergency

Administrator of Public Works, defendant.

CAVANAH, DISTRICT JUDGE:

The Washington Water Power Company engaged in generation and sale of electrical energy in the State of Idaho, and as a franchise holder and tax payer in the City of Coeur d'Alene, brings this suit against the City and certain of its officers and the Administrator of the Federal Emergency Administration of Public Works to restrain their issuing, pledging and selling certain bonds of the City and accepting and applying any loan or grant from the Federal Emergency Administration of Public Works for the construction of a municipal diesel engine generating plant and electrical distribution system and challenges the validity of the plan and proceedings upon the grounds that they are violative of the Fifth, Tenth and Fourteenth Amendments of the Constitution of the United States and of Section Three, Article Eight of the Constitution of the State of Idaho, in that they deprive the plaintiff of its property without due process of law and an unlawful invasion of power reserved to the States and not delegated to the United States when enacting the National Industrial Recovery Act, and that no power is granted to Congress to make a loan or grant of moneys of the United States to the City for the purpose of constructing the plant, and that the loan and grant involved are in excess of and outside the scope of the National Industrial Recovery Act, as they constitute the financing

by the Federal Government of a purely local proprietory business.

The foundation of jurisdiction is the diversity of citizenship and a controversy arising under the constitution and laws of the United States.

The defendants have moved to dismiss the bill and we are confined to the averments of it, which are voluminous, when in solving the questions presented. The essential facts as averred are: that the plaintiff is authorized to engage in the generation and distribution of electrical energy and as a public service corporation owns a hydro-electric power plant situated in the Spokane River at Post Falls, Idaho, about ten miles from the City of Coeur d'Alene, and several other plants situated on the River in the State of Washington, for the purpose of furnishing service to many of its customers and users of power in Northern Idaho and Eastern Washington, and are furnishing and do render electrical service to the territory in Idaho under authority of the Public Utilities Commission of the State; that it has expended more than Five Million Dollars in the construction and improvement of its electrical facilities in Idaho, and has issued and has outstanding bonds and stocks and a substantial portion of its stocks have been sold to its customers and employees and other citizens residing in the territory in which it operates; that its net earnings have been decreased very substantially during the years of the depression by reason of taxes and operating expenses.

On October 19, 1903, the Village of Coeur d'Alene predecessor of the City granted to the predecessor in interest of the plaintiff, a franchise for the furnishing to the inhabitants of the village, electricity for lighting and other purposes for a period of fifty years. In 1930, the plaintiff purchased the system and operated it. Since acquiring it the plaintiff has expended more than thirty-three thousand dollars in improvement and reconstruction of the system, and Twenty-seven Thousand Dollars for installation of new transformers.

The rates charged for such service in Idaho are subject to regulation and control by the Public Utilities Commission of the State.

The City has a population of 8297 and plaintiff does and its predecessor in interest has for more than thirty years furnished electrical service to all classes of customers in the City who number 2377 and 332 additional customers residing in territory adjacent to the City. The investment plaintiff has in the City is more than $200,000.00 and it pays taxes to the Government, State, County and City in large amounts.

On November 2, 1933 the City enacted an ordinance calling for an election for the purpose of submitting to the voters the proposition of the issuance of municipal bonds of $300,000.00 for the purpose of paying the costs and expenses of acquiring, by purchase or construction, a light and power plant and distribution system, and at the same time it also adopted an ordinance providing for the issuance of municipal bonds of $300,-

000.00 to pay the costs and expenses of acquiring by purchase or by construction, a water system. The election was held submitting for approval the two propositions, which resulted in their approval by more than two-thirds vote. After the City Council declared that the bond election had carried, it authorized the proper officers of the City to prepare an application to be made to the Federal Administration of Public Works for funds to construct the water system and light and power plant in the City. Pursuant to the direction of the Council, the officers of the City, on December 14, 1933, filed with the Federal Administration of Public Works application wherein a loan was requested of $650,000.00, and a net loan of $475,000.00 which is alleged to exclude a thirty per cent grant for the cost of labor and materials to be used in the construction of the electric and water systems. In the application it is stated that the total cost of the electric distribution and street lighting system is estimated to be $337,580.00 which is in excess of the amount of indebtedness authorized to be incurred for the purpose mentioned in the ordinance and the election held pursuant to the ordinance. Of the sum of $337,580.00 the total cost of labor and material is estimated at $276,512.91, and the contractor's profit thereon at $27,578.09, a total of $304,091.00 and other costs are estimated to be $44,480.00. Protest against the approval of the application was filed by the plaintiff with the Federal Administration of Public Works but it was approved by the Administrator in the amount of $337,580.00 for the electrical system, of which sum part

is to be a loan and part a grant. The City intends to enter into a contract, which it has already executed, with the Federal Administrator of Public Works for $337,580.00 and to issue and pledge its general obligation bonds as security for the amount of the loan and will construct the electrical system. Further it is alleged that the acts of the defendants will incur an indebtedness and create a liability exceeding the annual income and revenue of the City for that year without the assent of two-thirds of the voters and without provision being made for the collection of an annual tax for the interest on such indebtedness as it falls due and to constitute a sinking fund for the payment of the principal as provided in Section Three of Article Eight of the Constitution of the State of Idaho. That under the laws of the State the Public Utilities Commission has power to regulate and supervise rates and service of the plaintiff in supplying power and light and of any municipally owned utility, the Mayor and Council have exclusive power of regulation of rates and supervision of the service.

It is further alleged that prior to and during the campaign of the election at which the citizens voted on the proposition of issuing the bonds, an engineer employed by the City made an erroneous report as to the feasibility and cost of building a municipal light and power system by the City, and the cost of electric current to the consumers, which was by him at meetings held, and by publication given publicity, and that the voters were not advised of the omission of two sections

of the City from distribution and service as disclosed in the report. Untrue and mis-statements are alleged as having been made and published by the chairman of the fire, light and water committee of the City to the voters as to the cost of each system, not costing more than $300,000.00 and the kind of service to be rendered. The allegation appears that the properties and business of the plaintiff will suffer irreparable injury, disruption and damage if it should lose the electric utility business of the City through the illegal acts of the defendants, and it asserts that the reason thereof is that if the municipal light system is erected it will be compelled either to enter into competition and suffer substantial losses in its operations or abandon entirely its property and system in the City, which would result in discharging of a large number of employees. Its business consists in serving various users in large and small towns, rural districts, farms, mines, mills and smelters, and pumping water for irrigation, and each class lends aid to plaintiff's ability to carry on the others and are incapable of withdrawal without impairment of plaintiff's ability to serve the others. That the plan, if consummated, with the aid of a grant and loan from the Federal Government will result in unemployment of its employees. The application to the administrator is attached to the bill and it is alleged that there was attached thereto the engineer's report as to the type, expense of generation of electricity and cost of the system which is erroneous in many respects; that it is the intention of the defendants, first to construct a plant calculated primarily to serve

the business sections and the more populous sections of the City and that it will be unable to extend the service throughout the entire city with the funds which it has proposed to borrow and receive as a grant from the Federal Government, which will leave the plaintiff the sparsely populated sections of the City wherein the business is unprofitable and where plaintiff, if it continues to do business in the City would be unable to serve at reasonable rates without loss; that in the City's application for the loan and grant for the two systems, one hundred sixty men would be employed in the construction of the plants for a period of six months and in the engineer's report attached to the application, the labor costs of operation will include five men and one clerk, and in the operation of the water system three men and clerical help and office supplies aggregating $2000.00; that the plaintiff at the present time, has employed in the electric light and water service in the City twenty-four employees.

In the release of the Federal Administrator of date September 27, 1934, and other facts stated, it is declared that the purpose which he has adopted with respect to applications of municipalities for loans and grants is to make electricity more available and at cheaper rates than those of the existing utility.

With this recital of the facts as averred in the bill we approach the consideration of the questions involved when applied to them. The plaintiff asserts that it has acquired, under the ordinance of the City, a valid fran-

chise which is a property right, and within the protection of the constitution of the United States, against illegal competition and destruction and that such right is protected under the principles now recognized by the Federal Courts in the cases of Walla Walla City vs. Walla Walla Water Company 172 U. S. 1; Boise Artesian Hot and Cold Water Company vs. Boise City, 230 U. S. 84; Frost vs. Corporation Commission Oklahoma, et al., 278 U. S. 515; City of Campbell, Mo., vs. Arkansas Missouri Power Company, 55 Fed. (2nd) 560; Iowa Southern Utilities Company vs. Cassill et al., (CCA 8th) 69 Fed. (2nd) 703; Missouri Public Service Company vs. City of Concordia, Mo., et al., 8 Fed. Supp. 1; and as a property owner and tax payer in the City it has a right to restrain the City from taking the illegal steps averred in the bill. If the acts of the City as averred in the bill are unconstitutional and invalid there seems to be no doubt but what the plaintiff has a right to restrain the consummation of them if it will suffer a direct injury by reason thereof, but the validity of an act of Congress will not be considered by the Court on the ground that it is merely unconstitutional unless the plaintiff who invokes the power is able to show that it is not only invalid but that it has, or is immediately in danger of sustaining some direct injury as a result of its enforcement. In reply to plaintiff's contention the stress of the argument as urged by defendants is that under the plan for acquiring the electric system, Congress had power to enact the National Industrial Recovery Act from which authority is given

to the Federal Administrator to make the loan and grant for the construction of the system under the commerce and general welfare clauses of the constitution and the existence of an emergency. It is apparent that the National Industrial Recovery Act is predicated upon the thought expressed in it: "That a national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tends to diminish the amount thereof," Section 401, Title 40, USCA, provides: "To affect the purposes of this chapter the President is hereby authorized to create Federal Emergency Administration of Public Works, all of the powers of which shall be exercised by a Federal Emergency Administrator of Public Works." In Section 402 of the act it is also provided: "The administrator, under the direction of the President shall prepare a comprehensive program of Public works, which shall include among other things, the following: (a) Construction, repair and improvement of * * * * * all public buildings and any publicly owned instrumentalities and facilities." Then Section 403 of the act provides: "With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he

may designate or create, (1) to construct, finance, or aid in the construction or financing, of any public-works project included in the program prepared pursuant to section 402; (2) upon such terms as the President shall prescribe, to make grants to states, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project, * * * * * * * *."

These provisions of the act and the facts alleged require the consideration, first; Whether plaintiff will or is in immediate danger of suffering direct injury by reason of the consummation of the plan by the City with the Government. The bill states that as a franchise holder and tax-payer in the City, the plaintiff has an investment in its system of more than Five Million Dollars in Idaho, and more than Two Hundred Thousand Dollars in the City, and pays Government, State, County and City taxes in large amounts; that the plan covering the acquiring and construction of the system calls for an expenditure of $337,580.00, which has been approved by the Administrator and the contract already executed by the City for a loan and grant and which exceeds the amount authorized by the ordinance and voters of the City; that such amount would be insufficient to complete the plant and will leave an incomplete and inadequate plant requiring the levying by the City of a large amount in taxes to complete it; that the plan is unsound from an economic standpoint and will not eliminate unfair competitive practices, but

will tend to promote unfair and illegal competition which will result in a destruction of its property rights and deprive it of the right to continue furnishing electric light and power to the adjacent cities and territories of Northern Idaho, which are connected with its system in the City of Coeur d'Alene. From these and other facts appearing in the bill it would seem that the plaintiff has sufficient amount of interest and will suffer injury by reason of the adoption of the plan and construction of the system, and would as a tax payer be subjected to the payment of an illegal tax if the loan and grant are unauthorized, to entitle it to question the legality of the plan.

Second. Does the commerce clause of the national constitution conferring upon Congress the power to "regulate commerce with foreign nations and among the several states and with the Indian tribes" grant to it the power to make the loan and grant involved in this controversy?

One of the influential causes which lead to the adoption of the constitution was the need of an equitable regulation of commerce and the vesting in Congress power to regulate Interstate commerce so that uniformity of regulation would be insured against discriminating and conflicting state legislation, and the most confusing topic since its adoption in American Constitutional Law is: what is the proper dividing line between the respective powers of Congress and those of the States to regulate commerce? The test as to which has

the power as to a particular matter is not the kind of business one is engaged in but whether the business is carried on between the states or affects them. Whether it is of an interstate or intrastate character is to be determined by what is actually done. The decisions of the Courts have not been uniform upon the subject but the fundamental principles are fairly settled and the difference of opinion manifested in the decisions have been on the application of fundamental principles to the particular facts. The Supreme Court has often said that an arbitrary rule defining the line separating the exclusive power of the Nation from the power of the state cannot be established in view of the particular circumstances and rights involved, but there is uniformity of thought in the decisions that Congressional power over commerce is as to the subject of commerce which are national in their character and require a uniform plan of regulation affecting alike all of the states. It does not extend to regulate purely internal commerce of a state as the state has that reserved right. Kansas vs. Colorado, et al., 206 U. S. 46. Whether the particular transaction or act is one of Interstate Commerce, substance and not form must control.

These principles of limitation of the power of Congress as to the nature and extent of transactions under the commerce clause may be summarized to be, that activities which affect interstate commerce are within the power of the Central Government and Congress having the right in the field of interstate commerce has only power to legislate in matters affecting and obstructing

the free flow of such commerce. The particular facts alleged in the bill and which we are confined to when applying the principles thus stated are; that the City on November 2, 1933, called an election for the purpose of submitting to the voters the propositions of issuance of municipal bonds for $300,000.00 to be used in acquiring by purchase of construction, an electric system, and $300,000.00 to acquire a water system which were approved by a two-thirds vote. It then applied to the Federal Administrator of Public Works for funds of $650,000.00 to construct the two systems, a net loan of $475,000.00 which excludes thirty per cent grant to be used in the construction of the systems. The total cost of the electric system is estimated to be $337,580.00. The type of the electric system is a diesel plant and is to be located and operated within the City and State and to furnish electric current only to inhabitants of the City who will be the only ones to use and be benefited by it. In no way will it be extended across the state line and can only be treated as a local system which will be intrastate, and not interstate and not affecting directly or indirectly interstate commerce. So the application of the National Industrial Recovery Act to the transaction and plan involved in the present case cannot be construed as affecting interstate commerce or justified upon the ground that power is given to the National Government under that clause. Tenth Amendment of United States Constitution. Hammer vs. Dagenhart et al., 247 U. S. 251; Oliver Iron Min. Co. vs. Lord et al., 262 U. S. 172; Child Labor Tax Case, 259 U. S.

20; Kansas vs. Colorado, Supra; Missouri Public Service Co. vs City of Concordia et al., (Supra). We must look beyond the Commerce clause for congressional authority and it is said to be found in the general welfare clause of the constitution.

Third. We come then, next to consider whether Congress under Section 8 of Act 1, of the Constitution, "The Congress shall have power to lay and collect taxes, duties, imposts and excise, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States"; has power to make the loan and grant authorized by the National Industrial Recovery Act when applied to the facts we are considering. The reasons urged by the defendants as to why Congress has such power seems to relate to the extent of the power of Congress and not to the limitations imposed by the constitution on its actions. The uniform interpretation of this clause from the adoption of the constitution by the Courts and interpreters of it is that the Government of the United States can claim no power which is not granted to it by the constitution as it is one of enumerated and delegated powers, its authority being defined and limited by the constitution. Those powers enumerated were all with the view to "common defense and general welfare" and are parts of the sentence which embraced the whole of the eighth section of the first Article. Their objects cannot be stretched beyond the objects indicated in the enumerated powers granted by the Section. The Supreme Court

and interpreters of the constitution have given it the construction that if the welfare be not general but special it is not within the scope of the constitution, and the limitation of the words "general welfare" and its object and operation are to be general and not local. It does not grant power to Congress to appropriate moneys of the National Government for local or state benefit, as such appropriation is restricted to purposes of common defense and of national benefit, affecting the Nation as a whole. This view and spirit of construction was recognized by the Supreme Court when speaking through Mr. Chief Justice Marshall in considering the general welfare clause in the case of Gibbons vs. Ogden, 9 Wheaton 1, where he said "The genius and character of the whole Government seem to be that its action is to be applied to all the external concerns of the Nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular state, which do not effect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the Government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."

Again the Supreme Court confirmed the soundness of the construction given by Chief Justice Marshall in the case of Kansas vs. Colorado (Supra) where it is said: "But the proposition that there are legislative powers affecting the Nation as a whole which belongs to, although not expressed in the grant of powers, is in

direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'we the people of the United States,' not the people of one state, but the people of all the states, and Article X reserves to the people of all the States the powers not

delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not forsee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning. As we said, construing an express limitation on the powers of Congress, in Fairbanks v. United States, 181 U. S. 283, 288: 'We are not here confronted with a question of the extent of the powers of Congress but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized.' * * * * * * * "

The interpretation of the phrase "general welfare" given by Mr. Hamilton, limits its operation in the appropriation of money by Congress to matters general and not local and when Congress pronounces upon the

objects which concern the general welfare the qualification he gives of the generality of the phrase is: "the only qualification of the generality of the phrase in question which seems to be admissible is this; that the object to which an appropriation of money is to be made be general, and not local; its operation extending in fact or by possibility, throughout the Union, and not being confined to a particular spot." Mr. Madison's interpretation seems in effect to be the same when he said: "It has been urged and echoed, that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction."

President Monroe when discussing the general welfare clause in a message to Congress expressed the view, that "The substance of what has been urged on this subject may be expressed in a few words. My idea is that Congress have an unlimited power to raise money, and that in its appropriation thay have a discretionary power, restricted only by the duty to appropriate it to purposes of common defense and of general, not local, National, not State, benefit." The discretion in Congress to appropriate money is restricted to purposes of a general nature "not local, National, not state benefit," and an appropriation for purely a local purpose would be

an abuse of discretion.

The construction urged by the defendants, that although Congress may not regulate subject-matters on which the Constitution does not authorize legislation, yet it may promote them by appropriation and prescribe how such appropriation shall be applied, as the Constitution leaves it to the discretion of Congress to pronounce upon the objects which concern the general welfare and for which appropriations of money is requisite and proper without any limitation as to the objects being in fact general. Such construction would seem to contradict itself for if Congress is not authorized to legislate upon a certain subject-matter then it would follow that it may not appropriate money to carry out such unauthorized subject-matter. It certainly would not have power in the first instance to authorize the Administrator to construct the system in the City of Coeur d'Alene and if so then an attempt to appropriate money for the City to do so would be indirectly exercising a power it did not have. To say that Congress has power to declare certain purposes to be national when as a matter of fact they are not and have no relation to the Nation and are strictly local in a state, would defeat and nullify the express provisions of the Constitution limiting the power of Congress. The fact here is an apt illustration of this assumed authority, where the construction of a diesel engine plant and light system in and to be used solely by the inhabitants of the City of Coeur d'Alene, would not in any way be for a national purpose and to assert under the facts in

the bill that its construction would relieve unemployment and that an emergency existed does violence to the English language. The true principle is well settled in Linder vs. United States, 268 U. S. 5, as follows: "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

The instances in which Congress has levied taxes and made appropriations to promote purposes deemed by it National are those which in fact may be designated as relating to National matters relieving distress and suffering and are mostly acts applying to matters which come under the commerce clause. The citations urged by the defendants relate to such situations, and do not uphold the contention that the Courts are not empowered to review an act of Congress where it is urged that it is repugnant to the Constitution when in attempting to act or appropriate money of the United States for purposes not related to the powers delegated to Congress by the Constitution. Child Labor Tax case (Supra); Hammer vs. Dagenhart, (Supra); United States, et al. vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 282 U. S. 311; Adair vs. Unit-

ed States, 208 U. S. 161. Applying the Tenth Amendment to the facts here, no power is granted to the National Government to invade the exclusive power and functions of the State to regulate utilities in the state engaged solely in intrastate business and the Court cannot give effect to such legislation although designed to promote the highest good. Tenth Amendment to the Constitution; Child Labor Tax case (Supra); Hart Coal Corporation, et al. vs. Sparks, et al., 7 Fed. Supp. 16.

It is not seriously urged that under the facts alleged in the bill, an emergency in fact exists or to relieve unemployment or distress in the City of Coeur d'Alene, calling for the making the loan and grant. The bill discloses just the opposite, and one would gather from it that the real purpose of making the loan and grant is to bring about the construction of a utility and to regulate the rates for electricity for it clearly indicates that the lowering of rates is the primary purpose and object of the National Government in offering aid to the City as the administrator requires of the City to agree to reduce the rates twenty per cent below those now charged by the plaintiff before the loan and grant will be made, and should the plaintiff reduce its rate to meet the Administrator's approval the loan and grant will be refused. No other reason appears why the loan and grant is being made. Obviously direct control of local utilities operating solely within the State and the regulation of rates is in the State and beyond the power of the National Government.

In the recent case of Missouri Public Service Company v. City of Concordia et al. (Supra) the company a franchise holder and tax payer sought to restrain the City from making financial arrangement with the Administer of Public Works by way of a loan and grant to construct an electric plant and the Court held that the Administrator had no constitutional authority to aid the City in the construction of the project as its operations were purely local and intrastate.

Reliance is had on the recent decision in the case of Missouri Utilities vs. City of California, et al., of date November 2, 1934, unreported, as support of the construction of the general welfare clause urged by defendants to the effect that the object to be obtained is within the power of Congress, because Congress has declared in the Recovery Act that the Administrator shall prepare a program of Public Works which shall include the construction of public buildings and publicly owned instrumentalities and facilities, as the object and the selection of the means if related to it is exclusively within the discretion of Congress. The unsoundness in applying such reasoning to the power of Congress to pronounce upon an object which it thinks concerns the general welfare and to appropriate money of the United States to the instance and plan here, the primary and only object to be obtained is the construction of a municipal electric plant to be located and operated exclusively within the City of Coeur d'Alene, is not one of the objects within the delegated powers granted to Congress or incidental or in relation thereto,

if such be the case then any attempt regardless of the motive to appropriate money of the United States to carry out such unauthorized object would be exercising a power indirectly which could not be done directly and therefore is unconstitutional. Such an interpretation, so urged by the defendants, refutes itself and is an attempt to add to the Constitution a power of Congress that does not exist.

Finally the plaintiff insists that the plan of financing the proposed plant violates section 3 of Article 8 of the State Constitution, as the ordinance which was submitted to the voters provided only for incurring a liability or indebtedness in the sum of $300,000.00, whereas, the plan proposed provides for a plant costing in excess thereof. The provisions of the State Constitution limiting City's indebtedness and liability is: No * * * * * * City shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principle thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void."

The scope of the words "indebtedness or liability" as

employed in the State Constitution is meant to cover all character of debts and obligations which the City may become bound. The Supreme Court of the State has left no doubt as to its construction of this provision, for it has said "The constitution not only prohibits the incurring of any indebtedness, but it also prohibits the incurring of any *liability* 'in any manner or for any purpose' exceeding the yearly income and revenue. In this connection, it should also be observed that it not merely prohibits the incurring any *indebtedness or liability* exceeding the *revenue* of the current year, but it also prohibits the incurring any indebtedness or liability exceeding the *income* and *revenue* provided for such year." Feil vs. City of Coeur d'Alene, 23 Idaho, 32-49, 129 Pac. 643; Miller vs. City of Buhl, 48 Idaho 668, 284 Pac. 843.

In Straughn vs. City of Coeur d'Alene, 53 Idaho 494, 24 Pac. (2nd) 321, the Court held that a tax paying resident and Citizen could maintain a bill to restrain the City from acquiring light and waterworks system under the statute and ordinance imposing a liability upon the City, without providing for annual tax to discharge the liability, contrary to the constitution and gave the same construction of Section 8, Article 1 of the State Constitution as given in its previous decisions. It is obvious that the cost of the electric plant under the plan involved will exceed $300,000.00 the amount authorized by the ordinance and voters of the City, and is void under the State Constitution and decisions of the State Supreme Court.

Application of these principles to the facts appearing in the bill has not occasioned much difficulty and the conclusion reached accords with the general interpretation of the clauses of the constitution, when applied to the provisions of the National Industrial Recovery Act and the facts here involved. To now depart from such interpretation would add to the Constitution a power of Congress which does not exist, without pursuing the method provided in amending it.

From every point of view the loan and grant attempted to be made by the City with the Government cannot be sustained as they are illegal and unauthorized and the conclusion thus reached applies to the consummation of the loan and grant with the Government and the incurring of an indebtedness and liability of cost of acquiring, by purchase or by construction the electric plant in excess of $300,000.00, but with the exception thus stated relative to the loan and grant by the Government, should the City desire to purchase or construct such a plant by the sale or pledging of its bonds in an amount not exceeding $300,000.00, authorized by its ordinance and voters, it may do so in the manner provided for by the State laws.

An Order will be issued restraining the defendants and each of them from carrying out the contemplated loan and grant with the Government during the pendency of suit and until further Order of the Court. The motions to dismiss are denied. Exception granted to the defendants.

(Title of Court and Cause.)

OPINION

Filed December 13, 1934.

John P. Gray, W. F. McNaughton, Robert H. Elder, all of Coeur d'Alene, Idaho, Attorneys for the Plaintiff.

W. B. McFarland, C. H. Potts, of Coeur d'Alene, Idaho, Attorneys for City of Coeur d'Alene, Officers and City Council of said City, Henry T. Hunt, Special Assistant to Attorney General, Washington, D. C., John A. Carver, District Attorney for Idaho; E. H. Casterlin, Assistant District Attorney for Idaho; Frank Griffin, Assistant District Attorney for Idaho, all of Boise, Idaho, Attorneys for Harold L. Ickes, Federal Emergency Administrator of Public Works, Defendants.

CAVANAH, DISTRICT JUDGE:

The motion filed by certain of the defendants to strike portions of paragraphs 5 and 7, and paragraphs 13, 15, 16, 18, 19 and 20 of the bill will be denied.

As to the motion relating to the striking of paragraphs 13, 15 and 18 which are all directed to matters alleged to be erroneous statements made by the engineer at meetings and by publication during the campaign of the City election when the voters of the City were considering voting on the proposition and which in themselves might not be any reason why the election

was not legally held, yet those allegations are so commingled and connected with other allegations in the same paragraph relating to the report of the engineer as to costs, income and expenses of the plant which report was attached to the application of the City to the Administrator for the loan and grant and which it is alleged to be erroneous. It follows it is difficult to strike that without striking all of the paragraphs, portions of which, as stated, relate to the matters in the report of the engineer which was used and attached to the application of the City, for the loan and grant, made to the Administrator.

As to striking paragraph 19 of the bill, it follows that the same should be also denied as allegations there relate to the charge that the plant when constructed, the costs stated will be an insufficient amount, resulting in an uncompleted plant.

Accordingly Order will be entered.

(Title of Court and Cause.)

ORDER GRANTING INJUNCTION PENDENTE LITE

Filed December 31, 1934.

This cause came on to be heard on an order to show cause granted upon the application of the plaintiff and was argued by counsel, and thereupon, upon considera-

tion of the showing made, and the opinion of the court having been filed herein on the 13th day of December, 1934, and it appearing to the court that an injunction pendente lite should be granted herein for the following reasons:

That the Washington Power Company is engaged in generation and sale of electrical energy in the State of Idaho, and is the owner of a franchise in the City of Coeur d'Alene, Idaho, and under said franchise is engaged in furnishing electric light and power to the City and citizens of Coeur d'Alene, Idaho. That said service and the rates for the service is under the regulation and control of the Public Utilities Commission of Idaho.

That on November 2, 1933, the City enacted an ordinance calling an election for the purpose of submitting to the voters the proposition of the issuance of municipal bonds of $300,000.00 for the purpose of paying the cost and expense of acquiring, by purchase or construction, a light and power plant and distribution system; and at the same time it also adopted an ordinance providing for the issuance of municipal bonds of $300,000.-00 to pay the cost and expense of acquiring, by purchase or construction, a water system. Each proposition was approved by more than two-thirds vote and after the approval, the city council authorized the officers of the City to prepare an application to the Federal Emergency Administration of Public Works for funds to construct a water system and a light and power plant and distribution system in the City. Pursuant

to the direction of the council, the officers of the city on December 14, 1933, filed with the Federal Emergency Administration of Public Works an application, wherein a loan and grant was requested of $650,000.00 for said purpose. That the application was protested by plaintiff but it has been approved by the Federal Emergency Administration of Public Works in the amount of $337,580.00 for the electric plant and system, part as a loan and part as a grant, and the City has executed a contract for such loan and grant for that purpose.

That the proposed Diesel Engine electric generating plant and electric light and power distribution system is wholly within the State of Idaho and is in no sense an instrumentality of, or related to, interstate commerce. That said proposed contract providing for a loan and grant is not for the purpose of unemployment relief, but to foster and encourage municipal ownership and to regulate rates and charges for electric service, and is an illegal attempt to usurp the functions and powers of the State of Idaho, and beyond the power of the National Government. That the proposed loan and grant of funds of the United States by the Federal Emergency Administration of Public Works for said purpose is unauthorized and unconstitutional.

That the construction and operation of a competing electric light and power plant and distributing system at Coeur d'Alene would greatly impair, if not destroy, the value of plaintiff's franchise and property in Coeur

d'Alene. That plaintiff's franchise is a valuable right within the protection of the Constitution of the United States against illegal competition and destruction.

That the estimated cost of the proposed power plant and electric distribution and street lighting system is $337,580.00. That the City is and will be without other funds for said purpose, and it is in excess of the amount of indebtedness authorized to be incurred for said purpose; that said loan and grant is illegal and unauthorized and amounts to the incurring of an indebtedness and liability in excess of $300,000.00, in violation of the Constitution of the State of Idaho.

That the Washington Water Power Company is a taxpayer in the City of Coeur d'Alene. That if said loan is made, it will result in direct, immediate and irreparable loss and damage to the plaintiff.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Pending the final decree in this action, and until further order of this court, the defendants, City of Coeur d'Alene, Idaho, a municipal corporation; J. K. Coe, Mayor; A. Grantham, Treasurer; William T. Reed, Clerk; Lee Stoddard, Otto Gladden, Frank H. Lafrenz, Joseph Loizel, O. M. Husted, Cassius Robinson, S. H. McEuen and C. C. Hodge, members of the City Council of said City of Coeur d'Alene; and Harold L. Ickes, as Federal Emergency Administrator of Public Works, and their successors and each of them,

and their privies, and each of their respective officers, agents, counsel, servants and employees, and any and every person acting or attempting to act, are enjoined and restrained from entering into any contract with the Federal Emergency Administration of Public Works for the purpose of providing for, or in furtherance of, the construction of a municipal electric power and generating plant and distribution system, or the financing thereof with Federal Emergency Administration of Public Works funds and from delivering to the Federal Emergency Administration of Public Works any bonds of the City or from accepting or receiving any moneys thereof or therefor, or from accepting any gift or grant on account thereof, or from entering into any contract with respect to the building of, or for the purpose of, or in furtherance of, the construction of a municipal electric power generating and distribution system in the City of Coeur d'Alene.

2. Pending the final decree in this action and until further order of this court, the defendants, City of Coeur d'Alene, a municipal corporation; J. K. Coe, Mayor; A. Grantham, Treasurer; William T. Reed, Clerk; Lee Stoddard, Otto Gladden, Frank H. Lafrenz, Joseph Loizel, O. M. Husted, Cassius Robinson, S. H. McEuen and C. C. Hodge, members of the City Council of said City of Coeur d'Alene; and Harold L. Ickes, as Federal Emergency Administrator of Public Works, and their successors and each of them, and their privies and each of their respective officers, agents, counsel, ser-

vants, and employees and any and every person acting or attempting to act, are enjoined and restrained from proceeding with, or making effective any act or transaction in connection with, or in furtherance of, the construction of the municipal electric generating plant and distribution system, or the financing thereof with Federal Emergency Administration of Public Works funds or gifts or grants, or from issuing, pledging, selling or delivering any bonds of said city which are purported to be authorized by said Ordinance No. 713, with Federal Administration of Public Works, or accepting, using or applying any moneys, the proceeds of any loan, grant or gift from the Federal Emergency Administration of Public Works for any of said purposes.

3. This injunction is granted and will be continued, pending final decree in this action, or until the further order of this court upon the condition that the plaintiff will, within five days after entry of this order, file with the clerk of this court, in form and tenor first approved by the judge of this court, a good and sufficient bond or bonds of a surety company or companies, in the sum of SEVENTY-FIVE HUNDRED ($7500.00) Dollars, conditioned upon the prompt payment by the plaintiff to the defendants upon the direction of the court of all costs and damages which may be incurred or suffered by any of them respectively, who may be found to have been wrongfully enjoined or restrained hereby.

Done at Boise, Idaho, this 31st day of December, 1934.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

INJUNCTION BOND

Filed January 5, 1935.

Whereas, an injunction pendente lite and restraining order has been granted by the United States district court for the district of Idaho, Northern Division in the above entitled action on the application of the plaintiff, the Washington Water Power Company, a corporation, restraining the defendants, their successors, privies, and each of their respective officers, agents, counsels, servants, and employees and any and every person acting or attempting to act from entering into any contract with the Federal Emergency Administration of Public Works for the purpose of providing for, or in furtherance of, the construction of a municipal electric power generating and distribution system at Coeur d'Alene, Idaho, or the financing thereof, with Federal Emergency Administrator of Public Works funds, and from delivering to the Federal Emergency Administration of Public Works any bonds of the city or from accepting or receiving any moneys thereof, or

therefor, or from accepting any gift or grant on account thereof, or from entering into any contract with respect to the building thereof, with Federal Emergency Administration of Public Works, pending said action or until the further order of said court.

Now, therefore, we The Washington Water Power Company, a corporation, the plaintiff herein, as principal and Aetna Casualty and Surety Company, a corporation of Hartford, Conn., authorized to do a surety business in the State of Idaho, as surety, do hereby undertake, jointly and severally, to the defendants, J. K. Coe, Mayor; A. Grantham, Treasurer; William T. Reed, Clerk; Lee Stoddard, Otto Gladden, Frank H. Lafrenz, Joseph Loizel, O. M. Husted, Cassius Robinson, S. H. McEuen, and C. C. Hodge, members of the City Council of said City of Coeur d'Alene, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, in the penal sum of Seventy-five Hundred ($7500) Dollars, as fixed by the court upon the condition that plaintiff will pay to the defendants all and singular the costs and damages they or either of them may sustain by reason of such temporary restraining order, if it shall be finally decided the temporary restraining order ought not to have been granted.

THE WASHINGTON WATER
POWER COMPANY

(SEAL) By F. T. POST,
President,
Principal.

AETNA CASUALTY AND SURETY COMPANY,
By OSCAR W. NELSON,
(SEAL) Its Agent and Attorney-in-fact,
Surety.
By A. L. Gridley,
Attorney-in-fact.

Approved this 5th day of January, 1935.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

PETITION FOR APPEAL AND ALLOWANCE

Filed January 11, 1935.

TO THE HON. CHARLES C. CAVANAH, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO:

The above named defendants in the above entitled cause, considering themselves aggrieved by the Order Granting Injunction Pendente Lite, entered in the above entitled Court on the 31st day of December, A. D. 1934, in the above entitled cause, do hereby appeal

from the said Order Granting Injunction Pendente Lite, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and pray that their appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and documents, upon which said Order Granting Injunction Pendente Lite was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such Court in such cases made and provided.

And your petitioners further pray that the proper Order be made fixing the amount of the bond on appeal to be required of the defendants, except the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, who is exempt from such requirement by the provisions of Sections 869 and 870, of Title 28, of the United States Code.

HENRY T. HUNT, Special Counsel,
JOHN A. CARVER, U. S. Atty.
E. H. CASTERLIN, Assistant,
FRANK GRIFFIN, Assistant.
Attorneys for defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works.

W. B. McFARLAND,
C. H. POTTS,
Attorneys for defendant, City of

Coeur d'Alene, Idaho, a municipal corporation, City Officers and Members of the City Council of said City of Coeur d'Alene, Idaho.

The foregoing Petition is hereby granted and the appeal of the defendants to the Circuit Court of Appeals for the Ninth Circuit from the Order Granting Injunction Pendente Lite, entered in the above entitled Court on the 31st day of December, 1934 is hereby allowed.

It is further ordered that the amount of the bond on appeal to be required of said defendants, except the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works be and the same hereby is fixed at the sum of $500.00.

Dated this 11th day of January, A. D. 1935.

CHARLES C. CAVANAH,
District Judge.

Service of the within Petition for Appeal and Allowance by receipt of a copy thereof, admitted this 9th day of January, 1935.

W. F. McNAUGHTON,
JOHN P. GRAY,
ROBT. H. ELDER,
Attorneys for Plaintiff.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS

Filed January 11, 1935.

The defendants in the above entitled cause present and file the following Assignment of Errors upon which they will rely upon the prosecution of their appeal to the Circuit Court of Appeals for the Ninth Circuit from the Order Granting Injunction Pendente Lite, made and entered in the above entitled cause in the above entitled Court on the 31st day of December, A. D. 1934, to-wit:

1. The Court erred in granting an Injunction Pendente Lite in said cause.

2. The Court erred in finding, holding and deciding that the proposed contract providing for a loan and grant is not for the purpose of unemployment relief but to foster and encourage municipal ownership, and to regulate rates and charges for electric service.

3. The Court erred in finding, holding and deciding that the proposed contract providing for a loan and grant is an illegal attempt to usurp the functions and powers of the State of Idaho, and beyond the powers of the National Government.

4. The Court erred in finding, holding and deciding that the proposed loan and grant of funds of the United States by the Federal Emergency Administration of

Public Works for said purpose is unauthorized and unconstitutional.

5. The Court erred in finding, holding and deciding that said loan and grant is illegal and/or unauthorized.

6. The Court erred in finding, holding and deciding that said loan and grant amounts to the incurring of an indebtedness and/or liability in excess of $300,000.00, in violation of the Constitution of the State of Idaho.

7. The Court erred in finding, holding and deciding that if said loan is made it will result in direct and/or immediate and/or irreparable loss and damage to the plaintiff.

8. The Court erred in finding, holding and deciding that the Amended Bill of Complaint of plaintiff stated any grounds for the granting of an Injunction Pendente Lite.

9. The Court erred in finding, holding and deciding that the Amended Bill of Complaint stated facts sufficient to constitute a valid cause of action in equity, or to entitle the plaintiff to equitable relief.

10. The Court erred in finding, holding and deciding that the Amended Bill of Complaint states any matter of equity entitling the plaintiff to the relief prayed for therein, or to any relief against the defendants.

11. The Court erred in denying the motion of the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, to dismiss the Amended Bill of Complaint.

12. The Court erred in denying the motion of the defendants City of Coeur d'Alene, Idaho, a municipal corporation, the City Officers and the Members of the City Council of said City of Coeur d'Alene, Idaho, to dismiss the Amended Bill of Complaint.

WHEREFORE, defendants pray that the Order Granting Injunction Pendente Lite, made and entered in said Court on the 31st day of December, A. D. 1934, be reversed, and that the defendants be given such relief as the nature of the case demands.

HENRY T. HUNT, Special Counsel,

JOHN A. CARVER, U. S. Attorney,

E. H. CASTERLIN, Assistant,

FRANK GRIFFIN, Assistant,

Attorneys for defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works.

W. B. McFARLAND,

C. H. POTTS,

Attorneys for defendant, City of Coeur d'Alene, Idaho, a municipal corporation, City Officers and Members of City Council of said City of Coeur d'Alene, Idaho.

Service of the foregoing Assignment of Errors ad-

mitted and a copy thereof received this 9th day of January, A. D. 1935.

JOHN P. GRAY,
W. F. McNAUGHTON,
ROBT. H. ELDER,
Attorneys for Plaintiff.

(Title of Court and Cause)

CITATION ON APPEAL

Filed January 16, 1935.

THE PRESIDENT OF THE UNITED STATES TO THE WASHINGTON WATER POWER COMPANY, a corporation, the above named plaintiff, and to JOHN P. GRAY, W. F. McNAUGHTON, and ROBERT H. ELDER, ATTORNEYS FOR PLAINTIFF:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of Idaho, Northern Division, wherein the City of Coeur d'Alene, Idaho, a municipal corporation, J. K. Coe, Mayor, A. Grantham, Treasurer, William

T. Reed, Clerk, Lee Stoddard, Otto Gladden, Frank H. Lafrenz, Joseph Loizel, O. M. Husted, Cassius Robinson, S. H. McEuen and C. C. Hodge, members of the City Council of said City of Coeur d'Alene, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, are appellants, and the Washington Water Power Company, a corporation, is appellee, to show cause, if any there be, why the said order granting injunction pendente lite, in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Charles C. Cavanah, Judge of the District Court of the United States for the District of Idaho, this 11th day of January, A. D. 1935, and of the Independence of the United States, the One Hundred and Fifth-*eighth*, at the City of Boise, State of Idaho.

CHARLES C. CAVANAH,
District Judge.

Attest:

W. D. McREYNOLDS,
Clerk.

(SEAL)

Copy of the within and foregoing Citation on Appeal received this 14th day of January, A. D. 1935.

JOHN P. GRAY,
W. F. McNAUGHTON,
ROBT. H. ELDER,
Attorneys for Plaintiff.

(Title of Court and Cause)

BOND ON APPEAL

Filed January 26, 1935.

KNOW ALL MEN BY THESE PRESENTS, That we, City of Coeur d'Alene, Idaho, a municipal corporation; J. K. Coe, Mayor; A. Grantham, Treasurer; William T. Reed, Clerk; Lee Stoddard, Otto Gladden, Frank H. Lafrenz, Joseph Loisel, O. M. Husted, Cassius Robinson, S. H. McEuen and C. C. Hodge, Members of the City Council of said City of Coeur d'Alene, Idaho, as principals, and AMERICAN SURETY COMPANY, a corporation, organized and existing under and by virtue of the laws of the State of New York, as surety, are held and firmly bound unto the Washington Water Power Company, a corporation, the above named plaintiff in the sum of Five Hundred and No/100 ($500.00) Dollars, for the payment of which well and truly to be made, we bind ourselves, jointly and severally, and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of January, A. D. 1935.

WHEREAS, the above named defendants, the principals in this obligation, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse an

Order granting injunction pendente lite, made and entered in said cause on the 31st day of December, A. D. 1934, in favor of the plaintiff in the above entitled action.

NOW, THEREFORE, the condition of this obligation is such that if the above named defendants shall prosecute their said appeal to effect and shall answer all costs if they fail to make their plea good, and/or if they shall fail to sustain their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

CITY OF COEUR D'ALENE,
IDAHO, a municipal corporation,
BY J. K. COE,
Mayor,

ATTEST:
WILLIAM T. REED,
City Clerk.
(SEAL)

J. K. COE, Mayor,
A. GRANTHAM, Treasurer,
WILLIAM T. REED, Clerk,
LEE STODDARD,
OTTO H. GLADEN,
F. H. LAFRENZ,
JOSEPH LOISEL,

O. M. HUSTED,

C. C. ROBINSON,

S. H. McEUEN,

C. C. HODGE,

Members of City Council of said City of Coeur d'Alene, Idaho,

Principals.

AMERICAN SURETY COMPANY,

By OSCAR W. NELSON,
Its Attorney-in-fact,

By A. L. GRIDLEY,
Its Attorney-in-fact,

(SEAL)

Surety.

STATE OF IDAHO,
County of Kootenai, } ss.

On this 18 day of January, A. D. 1935, before me WILLIAM B. McFARLAND, a Notary Public in and for the State of Idaho, personally appeared OSCAR W. NELSON, and A. L. GRIDLEY, known to me to be the Attorney-in-fact and Attorney-in-fact, respectively, of AMERICAN SURETY COMPANY, the corporation that executed the within and foregoing instrument as surety, and acknowledged to me that such corporation executed the same; that they

know the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company; that they signed their names thereto by like order; that the said Company has been duly licensed by the Commissioner of Finance of the State of Idaho to transact business in the State of Idaho, and that it is authorized by the laws of the State of Idaho to become sole surety upon bonds.

WILLIAM B. McFARLAND,
Notary Public in and for the State of Idaho, residing at Coeur d'Alene, Idaho.
My Commission Expires July 29, 1938.

(SEAL)

The within Bond on Appeal is approved both as to sufficiency and form, this 24th day of January, A. D. 1935.

CHARLES C. CAVANAH,
Judge.

(Title of Court and Cause.)

PRAECIPE

Filed January 11, 1935.

To W. D. McREYNOLDS, Clerk of the District

Court of the United States, for the District of Idaho:

You will please prepare a transcript on appeal herein, including therein the following papers, towit:

Amended Bill of Complaint.

Affidavit of Richard McKay, filed in support of Motion for Injunction Pendente Lite.

Motion for Injunction Pendente Lite.

Motion of defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, to dismiss amended bill of complaint.

Motion of defendants, City of Coeur d'Alene, Idaho, a municipal corporation, City Officers and Members of the City Council of said City of Coeur d'Alene, Idaho, to Dismiss Amended Bill of Complaint.

Motion of defendants, City of Coeur d'Alene, Idaho, a municipal corporation, City Officers and Members of the City Council of said City of Coeur d'Alene, Idaho, to strike redundant matter from Bill of Complaint.

Order denying Defendants' Motions to Dismiss Amended Bill of Complaint, filed December 13, 1934.

Order denying Motion of Defendant, City of Coeur d'Alene, Idaho, a municipal corporation, et al., to strike redundant matter from Amended Bill of Complaint.

Opinion of Honorable Charles C. Cavanah, District Judge, filed December 13, 1934, denying Motions to

Dismiss and directing issuance of Order Restraining the defendants, and each of them, from carrying out the contemplated loan and grant with the government during the pendency of suit, and until further order of the court.

Opinion of Honorable Charles C. Cavanah, District Judge, filed December 13, 1934, denying Motion of certain of the defendants to strike redundant matter from amended bill of complaint.

Order granting Injunction Pendente Lite, dated and filed December 31, 1934.

Undertaking on Injunction.

Petition for Appeal and Allowance, with order allowing appeal, and fixing amount of bond on appeal, and acknowledgement of service.

Assignment of Errors and acknowledgement of service.

Citation on Appeal, and acknowledgement of service.

Bond on Appeal.

This Praecipe.

Certificate of the Clerk.

HENRY T. HUNT, Special Counsel,

JOHN A. CARVER, U. S. Atty.

E. H. CASTERLIN, Assistant,

FRANK GRIFFIN, Assistant.
Attorneys for defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works.

W. B. McFARLAND,

C. H. POTTS,

Attorneys for defendants, City of Coeur d'Alene, a municipal corporation, City Officials and Members of the City Council of the said City of Coeur d'Alene, Idaho.

Service of the within Praecipe by receipt of copy thereof, admitted this 9 day of January, A. D. 1935.

JOHN P. GRAY,

W. F. McNAUGHTON,

ROBT. H. ELDER,

Attorneys for plaintiff.

(Title of Court and Cause)

CERTIFICATE OF CLERK

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 213 inclusive, to be full, true and correct copy of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein. I further certify that the cost of the record herein amounts to the sum of $292.40 and that the same has been paid by the appellant.

WITNESS my Hand and the seal of said Court this 8th day of February, 1935.

(SEAL) W. D. McREYNOLDS, Clerk.

No. 7773

IN EQUITY

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF COEUR D'ALENE, IDAHO, a municipal corporation; J. K. COE, Mayor; A. GRANTHAM, Treasurer; WILLIAM T. REED, Clerk; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN and C. C. HODGE, Members of the City Council of said City of Coeur d'Alene, Idaho, and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,

Appellants,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

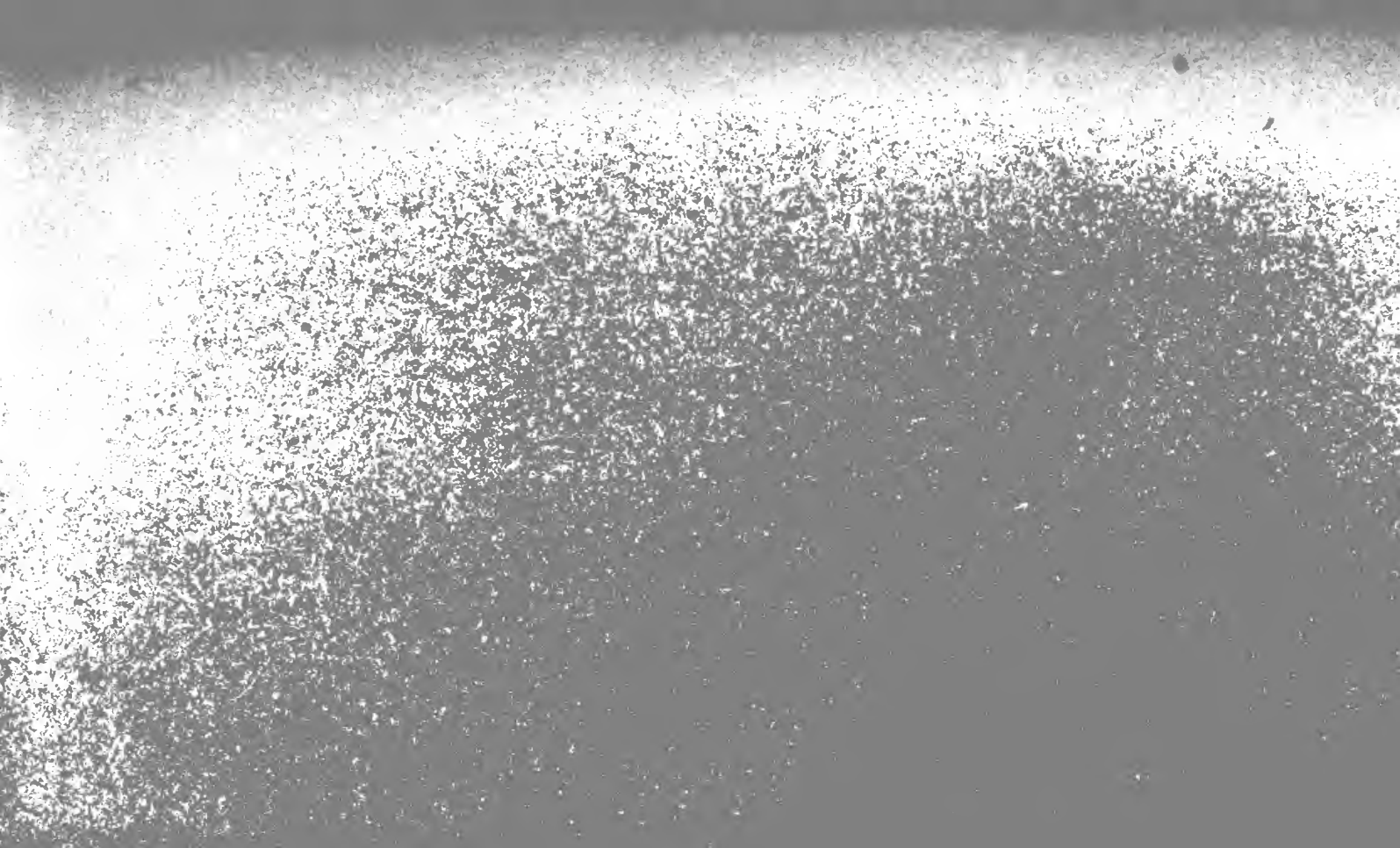
BRIEF OF APPELLANTS, CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION, CITY OFFICERS, AND MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

W. B. McFARLAND

C. H. POTTS

Attorneys for Appellants, City of Coeur d'Alene, Idaho, a municipal corporation, City Officers and Members of the City Council of said City of Coeur d'Alene, Idaho.



No. .....

IN EQUITY

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF COEUR D'ALENE, IDAHO, a municipal corporation; J. K. COE, Mayor; A. GRANTHAM, Treasurer; WILLIAM T. REED, Clerk; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN and C. C. HODGE, Members of the City Council of said City of Coeur d'Alene, Idaho, and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,

Appellants,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANTS, CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION, CITY OFFICERS, AND MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

W. B. McFARLAND

C. H. POTTS

Attorneys for Appellants, City of Coeur d'Alene, Idaho, a municipal corporation, City Officers and Members of the City Council of said City of Coeur d'Alene, Idaho.

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AUTHORITIES CITED

No. .....

IN EQUITY

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF COEUR D'ALENE, IDAHO, a municipal corporation; J. K. COE, Mayor; A. GRANTHAM, Treasurer; WILLIAM T. REED, Clerk; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN and C. C. HODGE, Members of the City Council of said City of Coeur d'Alene, Idaho, and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,

Appellants,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

STATEMENT.

This appeal is from an Order granting an Injunction Pendente Lite (R. p. 190-196) after Motions to dismiss the Amended Bill of Complaint for lack of equity (R. p. 157-159) had been denied (R. p. 188), and the District Judge had held in his opinion that a loan and grant to be made to the City of Coeur d'Alene by the Federal Government for the construction of a municipal light plant and distribution system would be illegal and unauthorized. (R. p. 188).

The hearing before the District Judge was upon questions of law raised by appellants' Motions to dismiss

the Amended Bill of Complaint (R. p. 165), and the injunction order followed a determination of these questions adverse to appellants (R. p. 164-188). The District Judge held that the averments in the Amended Bill of Complaint entitled appellee to injunctive relief as a matter of law. (R. p. 165).

The averments in the Amended Bill of Complaint are voluminous, and in the interest of brevity, an attempt will be made to group the essential facts alleged with respect to the controlling principles of law.

The City of Coeur d'Alene is a municipal corporation in the State of Idaho (R. p. 8), with a population in 1930 of 8297, according to the Federal census. Pursuant to an Ordinance enacted by the City Council of the City of Coeur d'Alene on the 2nd day of November, 1933, and approved by the Mayor on the same day (R. p. 16), an election was held on December 12, 1933, submitting to the voters a proposition of incurring a municipal indebtedness of Three Hundred Thousand ($300,000.00) Dollars, for the purpose of paying the costs and expenses of the acquisition by purchase or construction of an electric power plant and lighting system (R. p. 17). At the same election a proposition for incurring a municipal indebtedness of Three Hundred Thousand ($300,000.00) Dollars, by the issuance of municipal bonds of said City for the purpose of paying the costs and expenses of the acquisition by purchase or construction of a water works by said City was also submitted to the voters. (R. p. 17).

Thereafter, at a special meeting of the City Council

of the City of Coeur d'Alene, it was declared that the said bond election had carried by the necessary two-thirds (2/3) majority, and the City Council adopted a motion that the Mayor and other designated city officials be authorized to prepare an application to be made to the Federal Emergency Administrator of Public Works for funds to contruct a water works system and light and power plant in the City of Coeur d'Alene. (R. p. 18).

The Federal Emergency Administration of Public Works has approved the application made by the City of Coeur d'Alene, and will shortly advance funds to the City in the amount of Three Hundred and Thirty-seven Thousand Five Hundred and Eighty ($337,580.00) Dollars, for the purpose of constructing an electric power plant and power distribution system, partly as a loan through the sale of general obligation bonds of the City to the Federal Government, and partly as a grant amounting to thirty percent (30%) of the total cost of labor and materials, and the City will undertake the construction of a municipal power and generating plant and electric distribution system by the application of the proceeds of the loan and grant, and the City and its officers propose and threaten to enter into a contract with said Federal Emergency Administration of Public Works by the terms of which the City will undertake and agree to construct a Diesel engine electric power plant and power distribution system, costing at least the sum of $337,580.00. (R. p. 20).

The right of the appellee to maintain this suit and to

attack the legality of the proposed loan and grant, and the constitutionality of the law under which the loan and grant are authorized, is based on two grounds:

First: That appellee is a public service corporation (R. p. 10) owning and operating an electric power and light distribution system in the City of Coeur d'Alene, under a franchise granted by the Village of Coeur d'Alene, Idaho, to the predecessor of appellee, (R. p. 13), which franchise runs until 1953 and is not exclusive, (R. p. 34-37) and under which franchise electric service has been rendered the City of Coeur d'Alene by appellee and its predecessor in interest for more than thirty years, and appellee now possesses lawful and valid operating rights for the conducting of its electric business in said City. (R. p. 15)

Second: That appellee is a taxpayer of the United States, of the State of Idaho, of the County of Kootenai, of the City of Coeur d'Alene, and of other taxing districts in the State of Idaho, and is the owner of extensive properties subject to taxation by said taxing authorities. (R. p. 15)

The appellee attacks the validity of the election at which the proposition of incurring a municipal indebtedness of Three Hundred Thousand ($ 300,000.00) Dollars, and the issuance of municipal bonds of the City for the purpose of paying the costs and expenses of the acquisition or purchase or construction of an electric power plant and lighting system was approved by two-thirds (2/3) of the voters of said City, on two grounds:

First: That because of misleading, erroneous and false statements, advertisements and information put out by the mayor and Members of the City Council of the defendant city, and in the report of the Engineer employed by the City to the effect that the bond issue of $300,000.00 would result in no requirement for the payment of any sum, either principal or interest, through taxation, such a fraud against the voters existed that it vitiated the election and rendered said bonds illegal and unlawful. (R. p. 28 and 58).

Second: That because of misleading, erroneous and false statements, advertisements and information put out by the Mayor and Members of the City Council of the defendant City in concealing from the citizens and voters that two sections of the city under the proposed plan would not be included within the area to be served by said proposed municipal light and power system, such a fraud against the voters existed that it vitiated the election and rendered the bonds illegal and unlawful. (R. p. 29 and 58).

The validity of the proposed loan and grant is challenged upon the following grounds:

First: That Title II of the National Industrial Recovery Act is unconstitutional (R. p. 64 and 67).

Second: That Title II of the National Industrial Recovery Act does not authorize the Federal Emergency Administration of Public Works to loan moneys or give moneys of the Federal Government for the building of

municipal Diesel engine power generating plants and electric distribution systems. (R. p. 60).

Third: That the Federal Emergency Administrator of Public Works has abused his discretion in including this project among those to be financed with funds of the United States under the provisions of Sections 202 and 203 of the National Industrial Recovery Act. (R. p. 68-69).

Fourth: That the indebtedness created is in violation of Section 3 of Article VIII of the Constitution of Idaho in that the plan provides for the creation of an indebtedness and/or liability in excess of $300,000.00 for the plant and distribution system. (R. p. 59).

SPECIFICATION OF ERRORS.

Appellants make the following Specification of Errors upon which they will rely upon the prosecution of their appeal from the Order granting Injunction Pendente Lite made and entered in the above entitled cause on the 31st day of December, A. D. 1934, in the District Court of the United States for the District of Idaho, Northern Division, to-wit:

1. The Court erred in granting an Injunction Pendente Lite in said cause.

2. The Court erred in finding, holding and deciding that the proposed contract providing for a loan and grant is not for the purpose of unemployment relief but to foster and encourage municipal ownership, and to regulate rates and charges for electric service.

3. The Court erred in finding, holding and deciding that the proposed contract providing for a loan and grant is an illegal attempt to usurp the functions and powers of the State of Idaho and beyond the powers of the National Government.

4. The Court erred in finding, holding and deciding that the proposed loan and grant of funds of the United States by the Federal Emergency Administration of Public Works for said purpose is unauthorized and unconstitutional.

5. The Court erred in finding, holding and deciding that said loan and grant is illegal and/or unauthorized.

6. The Court erred in finding, holding and deciding that said loan and grant amounts to the incurring of an indebtedness and/or liability in excess of $300,000.00, in violation of the Constitution of the State of Idaho.

7. The Court erred in finding, holding and deciding that if said loan is made it will result in direct and/or immediate and/or irreparable loss and damage to the plaintiff.

8. The Court erred in finding, holding and deciding that the Amended Bill of Complaint of plaintiff stated any grounds for the granting of an Injuction Pendente Lite.

9. The Court erred in finding, holding and deciding that the Amended Bill of Complaint stated facts suffi-

cient to constitute a valid cause of action in equity, or to entitle the plaintiff to equitable relief.

10. The Court erred in finding, holding and deciding that the Amended Bill of Complaint states any matter of equity entitling the plaintiff to the relief prayed for therein, or to any relief against the defendants.

11. The Court erred in denying the motion of the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, to dismiss the Amended Bill of Complaint.

12. The Court erred in denying the motion of the defendants, City of Coeur d'Alene, Idaho, a municipal corporation, the City officers and the Members of the City Council of said City of Coeur d'Alene, Idaho, to dismiss the Amended Bill of Complaint.

ARGUMENT.

APPELLEE WILL SUFFER NO DIRECT INJURY, AND THEREFORE HAS NO STANDING TO QUESTION CONSTITUTIONALITY OF NATIONAL INDUSTRIAL RECOVERY ACT.

The rule that a direct injury must be shown as a basis for challenging the constitutionality of an Act of Congress has been established by many decisions of the Supreme Court of the United States.

Frothingham v. Mellon,
262 U. S. 447,

Williams v. Rieley,
280 U. S. 78-80,

Heald v. District of Columbia,
259 U. S. 114,

Fairchild v. Hughes,
258 U. S. 126,

City of Allegan v. Consumers Power Company,
71 Federal (2d) 477.

Appellee contends that it will suffer irreparable injury, disruption and damage if it should lose its electric utility business in the City of Coeur d'Alene through the alleged illegal and wrongful acts of the defendants. (R. p. 29). But appellee has no legal monopoly of the electric utility business in Coeur d'Alene. Its franchise is not exclusive (R. p. 84-87). The City is not a corporation which is required to secure a certificate of convenience and necessity from the Public Utilities Commission of the State of Idaho before constructing a competing system, as municipal corporations are expressly excepted from the corporations subject to the Public Utilities Commission by Section 59-104, Idaho Code Annotated, which reads as follows:

> "59-104. The term "corporation" when used in this Act includes a corporation, a company, an association and a joint stock association, but does not include a municipal corporation. . . . ."

In construing this Section the Supreme Court of Idaho has held that municipally owned utilities are not under the jurisdiction of the Public Utilities Commission.

Kiefer v. City of Idaho Falls,
49 Ida. 458; 289 Pac. 81.

The construction and operation of a municipal light

plant and distribution system by the City of Coeur d'Alene cannot result in a legal injury to appellee as the City will be doing only what it has a lawful right to do. Yet the only injury which appellee can sustain will result from this legal action on the part of the City, its injury, if any, will result from the construction and operation of a competitive electric lighting system.

As a public utility, owning and operating an electric lighting plant and distribution system in the City of Coeur d'Alene, the appellee will sustain no direct injury through the financing of the competitive municipal plant by the Federal Government. The source of the funds with which the municipal plant will be financed is of no concern to appellee as a public utility whose property and business may suffer injury and damage through competition of a municipal plant. If it will suffer injury by the construction of a municipal lighting plant, financed by Government funds, it would be injured to the same extent if the funds were received from other sources. The source of the funds has no connection with the threatened injury to the property and business of appellee.

Under the provisions of the Municipal Bond Law of the State of Idaho, the bonds which have been authorized must be sold to the bidder making the best bid therefor, subject to the right of the Mayor and City Council to reject any and all bids.

"Section 55-214, Idaho Code Annotated . . . . . .

"All other bonds shall be sold after notice given as herein provided, at public sale at a regular or special

meeting of the governing body of the issuer corporation, and any funding or refunding bonds shall be sold in like manner, if so ordered by any such governing body. No bond shall be sold for less than par and accrued interest to date of delivery."

"Section 55-216, Idaho Code Annotated . . . . "the said bonds shall be sold to the bidder making the best bid therefor, subject, as aforesaid, to the right of any such governing body to reject any and all bids and to re-advertise any such bonds for sale in the manner herein prescribed until said bonds have been sold."

It would be as reasonable to contend that a bank purchasing the bonds from the City and thereby providing funds for the financing of the plant was responsible for the injury which appellee fears from a competitive plant as it is to contend that the purchase of the bonds by the Federal Government is the cause of the injury. An injury or damage resulting from competition authorized by law cannot be a legal injury.

It is the policy of the State of Idaho to permit its cities and villiages to own and operate their own municipal light and water systems. No Statute has been enacted restricting such right. There is no limitation on the amount of indebtedness that can be incurred for such purposes so long as the constitutional requirements are complied with. No legislative intention to protect the private owners of public utilities from competitive municipal plants is apparent. The risk of competition from a municipally owned plant is inherent in the nature of the business in which appellee is engaged.

The threatened injury to appellee as a taxpayer is based on the contention that the loan and grant are illegal and therefore that at some future time the City may be required to repay the amounts received and collect taxes on the property of appellee for that purpose. On no other theory can appellee claim injury as a taxpayer.

In *City of Allegan v. Consumers Power Company,* 71 Federal (2d) 477, the Circuit Court of Appeals of the Sixth Circuit reversed an interlocutory injunction issued by the District Court of the United States for the Western District of Michigan, and held, among other things, that the plaintiff was without right to raise any question either as to the effect of or the constitutionality of the National Industrial Recovery Act in that suit, stating in the opinion:

> "The injury which is here claimed to threaten the utility is said to arise out of the possibility that the loan and grant to the City by the Public Works Administration may be declared invalid and that the government may demand immediate return of its money . . . . .
>
> "It has long been settled that the Courts have no power *per se* to review and annul Acts of Congress on the ground that they are unconstitutional. The question may be considered only when the justification for such direct injury suffered or theatened, presenting a justifiable issue is made to rest upon such Act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. The party who invokes the power must be able to show not only that the statute in invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its

> enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The fear that the Government might demand immediate return of the money advanced if the loan and grant should be declared invalid is more imaginary than real. It is based upon the assumption that the Government would not be able to recover the money loaned out of the bonds, and on the further assumption that such a demand could be enforced. If the loan should be held invalid because of lack of power of the Administrator to make the loan, the City would not thereby be relieved of its obligation to pay the bonds as they mature. On the other hand, if the invalidity arose from the lack of power of the City to incur the indebtedness because of the constitutional prohibition, then there could be no obligation to repay because the indebtedness would be void.

It is expressly provided in Section 3 of Article VIII of the Constitution of Idaho as follows:

> "An indebtedness or liability incurred contrary to this provision shall be void."

In construing this section of the Constitution, the Supreme Court of Idaho has uniformly held that any obligation incurred in violation of the section is void and unenforceable.

Ada County v. Bullen Bridge Co.,
5 Ida. 79, 47 Pac. 818,

Dunbar v. Board of County Commissioners,
5 Ida. 407, 49 Pac. 409,

McNutt v. Lemhi County,

12 Ida. 63, 84 Pac. 1054,

Boise Dev. Co. v. Boise City,
26 Ida. 347, 143 Pac. 531.

To the same effect is the decision in the case of *Dexter-Horton etc. Bank v. Clearwater County,* 235 Fed. 743.

It has been held by both State and Federal Courts in Idaho that a contract void under this section of the Constitution cannot be enforced either as an express or an implied contract.

Deer Creek Highway Dist. v. Doumecq Highway Dist.
37 Ida. 601, 218 Pac. 371.

Gillette-Herzog Mfg. Co. v. Canyon County,
85 Fed. 396.

Since the City can incur an indebtedness only pursuant to law, an obligation incurred outside of the law is not a debt.

Litchfield v. Ballon,
114 U. S. 190,

Buchanan v. Litchfield,
102 U. S. 578,

Greenburg Iron Co. v. City of Abberville,
2 Fed. (2d) 559,

Eaton v. Sheawassee County,
218 Fed. 592.

With respect to the grant,—it is made upon conditions which must be complied with by the City and pursuant to an Act of Congress presumed to be constitutional and valid. After the conditions have been per-

formed by the City, the status quo of the parties cannot be restored.

The decisions of the supreme Court and of other Federal Courts to the effect that money paid out without authority of law by an official of the United States may be recovered from the recipient in an action for money had and received, are not in point. None of those cases involved a grant of money made pursuant to an Act of Congress thereafter held invalid. They involved payments made with out any authority of law or under an erroneous construction of a statute.

A citizen is presumed to know the law but he is not charged with knowledge that a statute which is presumed to be constitutional will subsequently be declared unconstitutional. He is entitled to act upon the presumption of constitutionality which applies to every statute until it has been declared unconstitutional by the Courts.

United States v. Realty Company,
163 U. S. 427-438.

The possibility of the recovery from the City of any moneys received through the loan and grant and the levy of an assessment to provide funds to pay a judgment therefor, is so remote and conjectural that it could not constitute a direct injury. It is illusion created for the purposes of a law suit rather than a fact reasonably to be anticipated or feared.

THE VALIDITY OF THE BOND ELECTION CAN-

NOT BE ATTACKED BECAUSE OF MISLEADING, ERRONEOUS OR FALSE STATEMENTS OR INDUCEMENTS HELD OUT TO INFLUENCE THE VOTERS.

Humphrey v. Board of Com'rs, of City of Pratt,
144 Pac. (Kan) 197,

Murphy v. City of Spokane,
117 Pac. (Wn) 476-479,

Epping v. City of Columbus,
43 S. E. (Ga) 803-812.

The attack on the validity of the election at which the bonds were authorized by the voters is based solely on elleged misleading erroneous and false statements, advertisements and information put out by the Mayor and members of the City Council of the City to the effect that the bond issue of $300,000.00 would result in no requirement for the payment of any sum, either principal or interest, through taxation, (R. p. 28), and the concealment from the voters that two sections of the City were omitted from any distribution service. (R. p. 26).

The validity of an election cannot be assailed on such grounds.

In Humphrey v. Board of Com'rs of City of Pratt, *supra,* it was alleged that the bond election was carried through false representations and the Court said that unscrupulous campaign methods must be met in some other way than by an action to enjoin issuance and sale of the bonds.

In Epping v. City of Columbus, *supra,* a similar

contention was made and was disposed of by the Court in the following language:

> "It is contended that the bonds should not have been validated because at least 32 negro voters who voted in favor of the issuance of bonds were induced to do so by false and fraudulent statements made to them by officers of the town and others interested in the issuance of the bonds. This is no ground for refusing to validate the issue of the bonds. The courts cannot inquire into the motives prompting persons to vote on questions of this character, where the voter freely and voluntarily exercised this right. Inducements held out to influence a voter, although false and fraudulent, will not invalidate the election. The rule might be different where it appeared that by force and fraud the voter was compelled to vote in a way he did not desire to vote. The allegation of the objection in the present case did not bring the case within the purview of this last statement, even if that would be the rule. Where the election is regularly called and regularly held, and the voters freely and voluntarily exercise their right to vote, the election will not be invalidated simply because some of them have been misled by some one interested in the result of the election."

TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT IS CONSTITUTIONAL.

(a) The subject matter of the Act is within the Constitution of the United States, Article I, Section 8.

Constitution of the United States, ArticleI, Section 8.

McCulloch v. Maryland,
4 Wheat. 316, 401.

Field v. Clark,
143 U. S. 649, 693.

United States v. Realty Company,
163 U. S. 427.

Allen v. Smith,
173 U. S. 389.

Legal Tender cases,
12 Wall. 457, 532.

Massachusetts v. Mellon,
262 U. S. 447, 457.

U. S. v. Gettysburg Railway Co.,
160 U. S. 668.

Storey's Commentaries,
Fifth Ed. p. 675.

(b) The act is not an unconstitutional delegation to the President of the legislative powers of Congress.

Wayman v. Southard,
10 Wheat. 1, 43.

Field v. Clark,
143 U. S. 649.

Buttfield v. Stranahan,
192 U. S. 470, 496.

Union Bridge Co. v. United States,
204 U. S. 364, 386.

United States v. Grimaud,
220 U. S. 506.

Hampton & Company vs. United States,
276 U. S. 394.

McKinley v. United States,
249 U. S. 397.

United States v. Chemical Foundation,
272 U. S. 1, 12.

Federal Radio Commission v. Nelson Bros. Band & Mortgage Company,
289 U. S. 266.

Panama Refining Co. v. Ryan,
..... U. S. ....., 79, L. ed. 223, 235.

(a) The Constitution of the United States, Article 1, Section 8 provides:

> "Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States:
>
> . . . . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The title to the National Industrial Recovery Act reads as follows:

> "An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes."

The declaration of policy declared in Section 1 of Title I of the Act reads as follows:

> "Section 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organiza-

tion of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible untilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Title II of the act is entitled "Public Works and Construction Projects." The provisions of the first section of Title II (Section 201) authorize the President to create a Federal Emergency Administration of Public Works "to effectuate the purpose of this title," and provide that all the powers of the "Administration" so created shall be exercised by a Federal Emergency Administrator of Public Works. The President is empowered to establish such agencies as he may find necessary, and to delegate any of his functions and powers under Title II to such officers, agents and employees as he may designate or appoint.

Pursuant to this authority, the President has created the Federal Emergency Administration of Public Works, and has delegated to the Administrator sufficient of his functions and powers under the Act to enable him to execute the law.

Under the provisions of Section 202 of Title II of the Act, the Administrator, under the direction of the

President, is commanded to prepare a comprehensive program of public works which shall include among other things, the various types of projects therein enumerated.

It appears from the above and other provisions of the Act, that by Title II of the National Industrial Recovery Act, the Congress found and declared the following (among others) to be national purposes:

1. The preparation of a comprehensive program of public works, coextensive with the boundaries of the United States, and including not only the several States but also Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

2. A prompt increase of employment by means of Federal construction or Federal aid in financing the construction of projects included in the comprehensive program of public works prepared by the Administrator pursuant to the mandate of the Act.

3. The promotion of the thirty-hour week and consequent spreading of employment.

4. Increasing purchasing power by requiring the payment of just and reasonable wages.

5. Preference for veterans in the employment of labor on the public works projects.

Under the power to lay and collect taxes to provide for the common defense and general welfare of the United States (and by necessary implication, to expend the moneys collected from taxes) and to make all laws

which are necessary and proper for carrying into execution the powers expressly conferred and all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof, the Congress has, since the foundation of the Government, declared certain purposes national, and has appropriated federal moneys to carry out such purposes. It is the function of Congress to determine the purposes which will promote the general welfare of the nation and to make appropriations for such purposes.

Executive and legislative construction of constitutional provisions always has been and should be given great consideration by the Courts.

Downes v. Bidwell,
182 U. S. 244, 286.

United States v. Midwest Oil Company,
236 U. S. 459, 472.

Field v. Clark. Supra.

As was said by Chief Justice Marshall in McCulloch v. Maryland, *supra*:

> "An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."

It appears to have been the concensus of executive, legislative and judicial opinion during the history of our country that Congress has the power to appropriate money to carry out purposes which it has declared national in scope.

A search of the cases fails to disclose any decision by the Supreme Court adverse to such an interpretation of the general welfare clause. In only a few instances has the power of Congress been challenged.

In U. S. v. Gettysburg Railway Co., *supra*, the power of the Federal Government to condemn the land on which the Battle of Gettysburg was fought for the purpose of laying out a national park was questioned. The Court held that the power of condemnation resulted from the power of taxation to be exercised for the common defense and the general welfare, and that the use to which the condemned land was to be put was one so closely connected with the general welfare of the nation as to be within the power granted Congress by the Constitution for the purpose of protecting and preserving the whole country.

In United States v. Realty Company, *supra*, the power of Congress to appropriate money to pay a bounty to sugar manufacturers producing sugar meeting a certain test was challenged. The Act of Congress making such appropriation rested upon the power to levy taxes to provide for the general welfare. In the earlier case of Field v. Clark, Supra, the Supreme Court had declined to pass on the question whether the constitution empowered Congress to grant bounties to sugar producers. In United States v. Realty Company, the immediate question before the Court was whether the United States, having promised to pay a bounty, even if it had no power to do so, had thereby created a debt which Congress had power to discharge by an appropriation. The Court

decided that Congress had the power to appropriate money to pay a debt arising only from the moral obligation of the nation, "although the debt could obtain no recognition in a court of law."

It is a matter of common knowledge that vast unemployment was a grave condition confronting the country at the time the National Industrial Recovery Act was passed. The purpose of Congress "to reduce and relieve unemployment" as stated in the declaration of policy set forth in Section 1 of Title I of the Act, was the primary purpose for the enactment of the law. Senator Wagner, the member of the Committee in charge of the bill in the United States Senate stated:

> "Mr. President, the National Industrial Recovery Bill is an employment measure. Its single objective is to speed the restoration of normal conditions of employment at wage scales sufficient to provide a comfort and decent level of living."
>
> 77 Cong. Rec. 51-52, (1933)

The rule that Congressional debates will not ordinarily be considered by a Court interpreting a Federal statute does not apply to remarks made by a member of the Committee in charge of the bill.

> *Binns v. United States,*
> 194 U. S. 486, 495,
>
> 27 Ops. Attorney Gen. (1908) 68, 78.

Certainly, the relief of unemployment resulting from the existence of a great national depression and a breakdown of the economic system, was a national purpose.

The plan by which unemployment was to be relieved was for Congress to determine, and such determination was the performance of a legislative function, and is binding on the Courts.

The preparation of a "comprehensive program of public works" was one of the means which Congress determined would assist in the relief of unemployment, and thereby promote the general welfare of the nation.

(b) The powers delegated to the President by Title II of the National Industrial Recovery Act are purely administrative. He is charged with the duty of executing the law. The Congress has not abdicated any legislative function. All essential legislative functions are embraced within the law itself, and only executive functions remain to be exercised in the administration of the law.

The Act meets the requirements laid down by the Supreme Court of the United States in its latest expression on the subject, in the case of Panama Refining Co. v. Ryon, *supra*, in which it is said:

> "Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.

> Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

In the above case, the Supreme Court held Section 9, Subsection (c) of Title I of the National Industrial Recovery act unconstitutional on the ground that it was a delegation of legislative functions to the President. The Subsection authorizes the President to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof, produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed by any board, commission, officer or any other duly authorized agency of a State. Any violation of an order issued by the President under the provisions of Subsection (c) was made a criminal offense, punishable by fine or imprisonment or both. As stated by the Court, the Section "gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment."

Panama Refining Co. v. Ryan, *supra*, p 229.

The distinction between the powers attempted to be conferred by Subsection (c) of Section 9 of Title I of the Act, and those conferred by Title II is apparent, and is illustrated b the cases cited in the opinion, in which the difference between legislative functions and executive actions is pointed out.

Thus in Buttfield v. Stanahan, *supra*, an Act of Congress was upheld which authorized the Secretary of the Treasury, upon the recommendation of a board of experts to "establish uniform standards of purity, quality and fitness for the consumption of all kinds of tea imported into the United States," the Court said "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the Statute."

In Union Bridge Co. v. United States, *supra*, the Secretary of War was given authority to determine whether bridges and other structures constituted unreasonable obstructions to navigation, and to remove such structures, and it was held that by the statute, the Congress declared: "a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule."

In Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co., *supra*, the Court in construing the provisions of the Radio Act held that the standard set up was not so indefinite "as to confer an unlimited power."

In Field v. Clark, *supra*, it was contended that the statute involved was an unconstitutional delegation of legislative powers, but the Court held that "what the President was required to do was merely in execution of the Act of Congress," and this statement was approved in the later case of Hampton & Co. v. United States, *supra* involving the constitutionality of the flexible tariff pro-

vision, in which the Court said:

> "The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute, and directing details of its execution, even to the extent of providing for penalizing a breach of such regulations."

Title II of the National Industrial Recovery Act vests in the President, through agencies to be selected by him, the power to direct the details of the execution of the law. This is manifestly a function of the executive branch of the Government. Congress had proceeded as far as it could go in the exercise of its legislative functions when it prescribed the general classes of projects to be included in the comprehensive program of public works to be prepared and carried out to effectuate the purposes of the law. It laid down the rule and provided the standard for the executive to follow in the selection of the projects to be included in the comprehensive program of public works, and this was as far as it could practically go in the exercise of its legislative functions because the legislation had to be adapted to complex conditions involving a host of details with which the Congress could not deal directly.

Title II of the National Industrial Recovery Act relates solely to the expenditure of public moneys "with a view to increasing employment quickly," to promote the general welfare. The subject matter is entirely different

from that embraced in Title I of the Act. Title II does not purport to regulate the actions or conduct of individual citizens in their private capacities. It does not empower the President to make an orders such as those provided for in Subsection (c) of Section 9 of Title I of the Act, a violation of which is punishable by fine or imprisonment.

The powers granted to the President by Title II are within the rule laid down by the Supreme Court in the cases cited.

TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT AUTHORIZES THE FINANCING OF THIS PROJECT.

A "comprehensive program of public works" is necessarily made up of many component parts. Its nature requires that many projects be included, otherwise it would not be a "comprehensive program," but limited in its scope. It cannot consist of one giant project, coextensive with the boundaries of the nation. It is a "program" of public works,—not merely one great Federal project.

The municipal lighting system in Coeur d'Alene is only one of many projects that have been included in the "comprehensive program." Considered by itself, it might not go far toward accomplishing the purpose of the Act, but when combined with hundreds of other projects of a similar character scattered throughout the length and breadth of the land, it becomes a part of the national program.

The "comprehensive program of public works" authorized by the Act, includes by express enumeration (among other things) the following:

> "(a) Construction . . . of any publicly owned instrumentalities and facilities."
>
> (c) Any projects of the character heretofore constructed or carried on either directly or by public authority or with public aid to serve the interests of the general public."

The Coeur d'Alene project is a publicly owned instrumentality or facility. Also, it is a project of the character heretofore constructed and carried on by public authority.

Section 203 (a) of the National Industrial Recovery Act provides:

> "Sec. 203 (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or thru such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to Section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities or other public bodies for the construction, repair or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; . . . ."

The Coeur d'Alene project has been included in the comprehensive program of public works which the Administrator has prepared under the direction of the President pursuant to the authority granted by Title

II of the National Industrial Recovery Act.

As a part of the general program, the construction of the project will assist in accomplishing the purposes of the law. While it is true that the labor expended upon this project alone will not relieve unemployment in the nation, it will furnish employment to some, and in conjunction with all the other projects of a similar character, financed in the same manner, the relief of unemployment will be materially advanced. The employment furnished will not be limited to the labor performed locally in the construction of the project but will extend to the labor performed in the factories and industries where the machinery and equipment utilized in the project will be manufactured.

THE COURTS WILL NOT INTERFERE WITH THE EXERCISE OF DISCRETION BY EXECUTIVE OFFICERS

It is well settled that the Courts may not review the exercise of adminstrative discretion reposed in officers of the Government by Act of Congress.

United States v. Chemical Foundation,
272 U. S. 1, 14, 15.

Dakota Cent. Teleph. Co. v. South Dakota,
250 U. S. 163, 182, 184.

Louisiana v. MacAdoo,
234 U. S. 627.

In United States v. Chemical Foundation, *supra,* the Court said that the presumption of regularity supports the official acts of public officers, and in the absence of

clear evidence to the contrary, Courts presume that they have properly discharged their official duties, and stated in the opinion:

> "Under that presumption it will be taken that Mr. Polk acted upon knowledge of the material facts. The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the Courts."

In Dakota Cent. Teleph. Co. v. South Dakota, *supra*, the Court said that the contention made assailed the motives which it is asserted induced the exercise of power by the President, and then stated in the opinion:

> "But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this Court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

Under the provisions of the Act, it is the province of the Administrator to determine, under the direction of the President, whether or not a particular project shall be included in the comprehensive program of public works and financial assistance furnished by the Government. The determination of this question is the exercise of an executive function which should not, and under the decisions can not, be reviewed by the Courts. It is an exercise of discretion which is not the subject of judicial review.

In Louisiana v. McAdoo, *Supra*, the Court said:

> "If the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the Court will refuse to substitute its judgment or discretion for that of the official entrusted by law with its execution. Interference in such a case would be to interfere with the orderly functions of government."

THE LOAN AND GRANT IS NOT IN VIOLATION OF SECTION 3 ARTICLE VIII OF THE CONSTITUTION OF IDAHO.

Section 3 of Article VIII of the Constitution of Idaho reads as follows:

> "3. Limitations on county and municipal indebtedness. No county, city, town, township, board of education, or school district, or other subdivision of the state shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: PROVIDED, That this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

It is contended that because the City of Coeur d'Alene proposes to expend $337,580.00 in the construction of a

municipal electric power plant and distribution system, and has voted bonds for $300,000.00 for that purpose, that the plan is in violation of the constitutional limittations.

It is not contended, as we understand the allegations of the Bill, that the requirements of Section 3, Article VIII of the Constiution of Idaho have not been complied with by securing the assent of two-thirds of the qualified electors of the city voting at an alection held for that purpose, and by providing for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. There are no allegations in the Bill questioning such compliance.

It appears, therefore, that the only basis for the contention is that the cost of the system will exceed the amount of the bonds authorized at the election.

It is not proposed to create an indebtedness or liability amountg to $337,580.00, or even in the amount of the bonds authorized at the election. The cost of the labor and materials is estimated at the sum of $276,512.91, (R. p. 19) and a grant of 30 per cent of the total cost of labor and materials, plus contractors' profits, would amount to $91,230.00. (R. p. 20). The grant does not imply any obligation of repayment on the part of the City except on the theory of illegality and consequently an implied agreement to repay, heretofore discussed in this Brief. If there is no obligation on the part of the City to

repay the grant it would not constitute an idebtedness or liability.

It is only an indebtedness or liability that falls within the condemnation of the constitutional limitation. It makes no difference how much the improvement costs if an indebtedness or liability does not arise from the transaction. The City is not prohibited from accepting a gift or grant or from constructing any improvement at any cost if it can secure the funds for the project without incurring an indebtedness or libility to repay them.

Incidentally, it is contended that the proposed loan and grant are in violation of the Fifth, Tenth and Fourteenth Amendments to the Constitution of the United States, but these contentions have so little foundation to support them that they were ignored by the lower Court, and do not require any discussion.

Repectfully submitted,

W. B. McFARLAND

C. H. POTTS
Attorneys for Appellants, City of Coeur d'Alene, Idaho, a municipal corporation, City Officers and Members of the City Council of said City of Coeur d'Alene, Idaho.

No. 7775

In the United States Circuit Court of Appeals for the Ninth Circuit

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. MCEUEN AND C. C. HODGE, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

BRIEF OF HAROLD L. ICKES AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

HENRY T. HUNT,
Special Assistant to the Attorney General.

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CASES CITED

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7773

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. MCEUEN, AND C. C. HODGE, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, appellants

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

BRIEF OF HAROLD L. ICKES AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

NATURE OF THE SUIT

This is an appeal from the order of the District Court of the United States for the District of Idaho, Northern Division, filed December 13, 1934,

denying the defendants' motion to dismiss (Tr. p. 162) and from an order filed December 30, 1934, granting an injunction *pendente lite* restraining the defendants from proceeding with the construction of the municipal electric generating plant and distribution system described in the bill or the financing thereof with funds of the Federal Emergency Administration of Public Works (Tr. pp. 190–196).

SPECIFICATION OF ERRORS

The errors assigned are:

1. The court erred in granting the injunction *pendente lite*.

2. In finding that the proposed loan and grant agreement is not for the purpose of unemployment relief but to foster and encourage municipal ownership and to regulate rates and charges for electric service.

3. In finding that the proposed contract is an illegal attempt to usurp the functions of the State of Idaho and is beyond the powers of the National Government.

4 and 5. In finding that the proposed loan and grant is unauthorized and unconstitutional.

6. In finding that the said loan and grant amounts to the incurring of an indebtedness or liability in excess of $300,000 in violation of the Constitution of the State of Idaho.

7. In finding that if said loan is made it will result in direct and/or immediate and/or irreparable loss and damage to the plaintiff.

8. In finding that the amended bill of complaint stated any grounds for the granting of an injunction *pendente lite.*

9 and 10. In finding that the amended bill stated facts sufficient to constitute a valid cause of action in equity or to entitle the plaintiff to equitable relief.

11 and 12. In denying the motions of the defendants to dismiss the amended bill.

SUMMARY OF AMENDED BILL

The appellee, plaintiff below, is a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of the State of Washington, and is authorized to do business in the State of Idaho and to hold property in said State.

The City of Coeur d'Alene, defendant below, is a municipal corporation created under and by virtue of the laws of Idaho and a citizen of said State.

The defendant, Harold L. Ickes, is the appointed and duly acting Federal Emergency Administrator of Public Works appointed under the provisions of Title II of the National Industrial Recovery Act.

The jurisdiction of the United States District Court for the District of Idaho is invoked upon the ground that the suit is of a civil nature, arises under the Constitution of the United States, involves the Fifth Amendment and Section 1 of the

Fourteenth Amendment, and the constitutionality, construction, and interpretation of the National Industrial Recovery Act. Diversity of citizenship is also alleged.

The plaintiff is authorized to engage in the sale of electric energy within the cities in the State of Idaho. It is the holder of a franchise, dated October 19, 1903, granted to its predecessor for furnishing to the inhabitants of the Village of Coeur d'Alene electricity for lighting and other purposes for fifty years from the date thereof. In 1930 the plaintiff purchased the electric power distribution system of the City and has since owned, maintained and operated it. Plaintiff has expended more than $33,000 in improving said system and $27,000 for new transformers. Its rates are subject to regulation by the Public Utilities Commission of Idaho. It furnishes electrical service to all classes of customers in the City, in number 2,377, and also furnishes service to 332 additional customers residing in adjacent territory. It has an investment in the distribution system of more than $200,000.

The plaintiff is also a taxpayer of the United States, of the State of Idaho, of the County of Kootenai, and of the City of Coeur d'Alene.

The amended bill recites certain proceedings of the City calling an election for the purpose of submitting to the voters the proposition for incurring an indebtedness of $300,000 by the issuance of gen-

eral obligation bonds of the City to pay the cost and expense of the acquisition by purchase or by construction of a municipal light and power plant and distribution system, the proceedings of the City Council in adopting an ordinance (No. 713), providing for the incurring of indebtedness of $300,000 for the said electric system and also an ordinance for the incurring of a further indebtedness of $300,000 (No. 723, total $504,000 including the $300,000) to finance the cost of the acquisition by purchase or construction of a waterworks system. An election was provided for in each of the ordinances and was called and held on December 12, 1933. It resulted in the approval of both propositions by more than two-thirds of the voters voting. Thereafter, and pursuant to a motion of the City Council authorizing the City officers to apply to the Federal Emergency Administration of Public Works for the necessary funds, said officers made an application to finance the cost of construction of the electric and waterworks systems in the amount of $650,000, including a grant equal to 30% of the cost of labor and materials to be used in the said construction. The Administrator has approved the said application and will advance funds to the City in the amount of $337,580 for the purpose of constructing the electric system, which sum includes the amount of the grant.

The amended bill charges that the incurring of an indebtedness or liability exceeding the annual

income and revenue of the City for "that year" without the assent of two-thirds of the qualified voters voting at an election held for the purpose and without provision being made for the collection of an annual tax sufficient to pay the interest and provide a sinking fund for such indebtedness and/or liability is in violation of Section 3 of Article VIII of the Idaho Constitution.

An engineer employed by the City made a report, which was published and influenced the voters at the election. Said report was erroneous, among other things, in not disclosing that two sections of the City were omitted from the distribution system. The erroneous statements in the report deceived the voters into voting favorably on the questions submitted.

That injury which will result from the accomplishment of the City's construction of the electric system in that the plaintiff will be compelled either to compete with the City and suffer substantial loss or abandon business in Coeur d'Alene. In case of abandonment certain classes of employees of the plaintiff will be discharged and the number of others reduced. Through this loss the plaintiff will be compelled to serve other customers at a loss or with less profit. The action of the Administrator of Public Works in making a loan and grant to the City for the purpose stated is an abuse of discretion granted him by the National Industrial Recovery Act.

The amended bill further sets out a press release of the Administrator which declares his policy as to applications of municipalities to finance municipal electric systems, the purport of which is that such applications will be approved only where it appears that the municipal system will effectuate a reduction of rates below those charged by utility corporations, with opportunity before the municipal system is financed to such corporations to reduce rates in the City applying. This policy shows that the loan and grant is not primarily to provide employment but to effectuate a reduction of rates, whereas the regulation of rates is a matter for the State of Idaho through its Utilities Commission.

The amended bill further alleged that on November 20, 1934, the City received from the Administrator a proposed contract providing for a loan and grant not in excess of the amount of $650,000 for the financing of the City's water system, generating plant, and electric distribution system, that the agreement was thereupon executed by the City. The proposed agreement is attached to the amended bill, made a part thereof, and appears, Transcript of Record, Exhibit D, p. 91 et seq.

The amended bill charges that the actions and proceedings already taken in pursuance of the City's plan and the threatened actions which defendants are about to take under such plan are unlawful as:

1. The misleading statements made by the City officers deceived the voters and vitiated election;

2. They concealed from the voters the fact that two sections of the City would not be included within the area to be served whereby also the election was vitiated;

3 and 8. Section 3, Article VIII, Idaho Constitution, provides that no City shall incur any indebtedness for any purpose exceeding "in that year the income and revenue provided for it during such year without the assent of two-thirds of the qualified voters, nor unless provision is made for an annual tax to pay the interest and to constitute a sinking fund for the payment of the principal within twenty years from the time of contracting the indebtedness." It is claimed that the plan of the City officers requires an indebtedness in excess of $300,000 (the amount approved at the election) for said plant and distribution system within the meaning of said Article;

4. Ordinance No. 723, Exhibit C of the complaint, and the proposed loan and grant agreement provide for the water system, together with the electric system; whereas the ordinance calling for the election (No. 713) provides only for the submission to the voters of the electric system, the plan of the City involves the incurring of an indebtedness of $650,000, less the grant but the voters have authorized only an indebtedness of $300,000;

5, 6, and 7. The Recovery Act does not authorize the Administrator to loan or grant moneys of the

Federal Government for the building of municipal electric systems;

9. The City does not propose to engage in interstate commerce;

10. The proposed loan and grant would be illegal and the City would be required to repay it and would thereby become indebted in excess of the amount authorized by Section 3 of Article VIII, Idaho Constitution;

11. The issuance of the bonds and the proposed use of the proceeds and of the proposed grant are in violation of the Fifth Amendment and Section 1 of the Fourteenth Amendment of the National Constitution in that the plaintiff would be thereby deprived of its property without due process of law;

12 and 13. Congress has no power to make a loan or grant of public moneys of the United States to the City of Coeur d'Alene for the purposes stated, and is prohibited from providing such loan and grant by the Fifth and Fourteenth Amendments;

14, 17, and 18. If Congress has power to make such a loan and grant it may not lawfully delegate that power;

15, 18, and 22. The loan and grant is only of local and not of general benefit, hence it does not tend to provide for the general welfare of the United States;

19 and 20. The action of the Administrator is an abuse of discretion;

21. Such disbursement of national funds is unlawful under the Tenth Amendment in view of the policy declaration of the Administrator and is ultra vires.

In substance the bill charges that the plaintiff will suffer illegal injury directly through the performance of the loan and grant agreement; that it is not authorized by the Recovery Act, is an abuse of discretion; that the Act is an unlawful delegation of legislative power; that insofar as it purports to authorize the financing by loan and grant of such projects it is beyond the power of Congress, being not an exercise of powers delegated to Congress by the Constitution; is a violation of the Fifth Amendment and, in conjunction with the City's participation, a violation of the Fourteenth Amendment; and as construed by the Administrator in his policy declaration in violation of the Tenth Amendment.

SUMMARY OF LOAN AND GRANT AGREEMENT

The District Court enjoined the defendants from

> * * * proceedings with * * * the construction of the municipal electric generating plant and distribution system, or the financing thereof with Federal Emergency Administration of Public Works funds or gifts or grants, or from issuing, pledging, selling, or delivering any bonds of said city which are purported to be authorized by said Ordinance No. 713, with Fed-

> eral Administration of Public Works, or accepting, using, or applying any moneys, the proceeds of any loan, grant, or gift from the Federal Emergency Administration of Public Works for any of said purposes (Tr. p. 195).

As the loan and grant agreement expresses the entire intention of the Administrator and the City with regard to the purchase of the bonds and the grant, and it is the performance of this agreement which is challenged as illegal and as threatening injury to appellee, it is necessary that this court be apprised of its provisions. It is set forth in the Transcript of Record beginning page 91.

Part I provides that, subject to the terms and conditions stated, the Government will by loan and grant, not exceeding in the aggregate the sum of $650,000, aid the City in financing a project consisting substantially of the construction of a water system, including sinking wells, installing pumps, and a distribution system for water service; also a Diesel engine generating plant and electric distribution system.

The financing is by means of a loan (purchase of bonds) and a grant. The City agrees to sell and the Government to buy at the principal amount thereof, plus accrued interest, $504,000 of certain bonds (if not purchased by others).

The Government will also make and the Borrower will accept, whether or not any or all of the

bonds are sold to other purchasers, a grant in an amount equal to thirty percentum of the cost of labor and materials employed upon the project. If all the bonds are sold to other purchasers the Government will make the entire grant with the payment of money. In no event shall the grant be in excess of $175,000.

The Borrower is required to deposit the proceeds of the sale of bonds and the grant in construction accounts and to apply them solely to the cost of construction of the project or to the extinguishment of the bonds or interest. The Borrower is required to commence the construction of the project upon receipt of the first bond payment and continue it to completion with all practicable dispatch.

The Government is not required to purchase any bonds unless the Borrower adopts a rate and bond ordinance providing that no donations, taxes, depreciation charges, or any other items of expense, except normal operating expenses and maintenance, together with water, light, and power-line extensions, shall be charged against the revenues of the project.

All municipally used water and electric energy shall be paid for at current selling-rate schedules, except water used in fighting fire, and a reasonable rent shall be paid for hydrant rental, all such payments to be made as the service accrues from the general funds of the Borrower into the funds of the Borrower's water and electric departments (Tr. p. 104).

The Borrower covenants that when electrical energy from the Government power project at Grand Coulee, Washington, is available at rates such that the cost thereof to the Borrower shall be less than the cost thereof delivered from the Diesel engine generating plant, the Borrower will cease active operations of such Diesel plant and place it on a standby basis only, and will puchase its electric energy requirements from the said Government power project.

Part II. In consideration of the grant the Borrower covenants that all work on the project shall be subject to the rules adopted by the Administrator to carry out the purposes and control the administration of the Act (no convict labor, hours per week not to be in excess of thirty hours, wages not to be less than the hourly wage rates for skilled and unskilled labor prescribed by the Administrator or those provided by collective agreements, preferences to ex-service men with dependents and to local residents, compliance with Section 7 (a) of Title I of the Recovery Act, the contractor to comply with codes established under Section 1 of the Act).

The amended bill incorporates this agreement. No other action than that expressed in the agreement is contemplated by the Administrator and the bill contains no allegations that the Administrator intends any other action except that it sets out a letter, dated November 21, 1934, from the Federal Emergency Administration of Public

Works to the Mayor of Coeur d'Alene requiring in further consideration of the grant the enactment of a rate ordinance by the City whereby its electric rates should be fixed on a basis approximately 20% below the existing rates (those charged by the appellee) (Tr. pp. 55–56).

The date (not shown in the transcript) of the loan and grant agreement as shown by the certificate attached thereto is December 17, 1934. It was executed by the City later. It does not contain the condition as to the rate ordinance set out in the letter of November 21. It appears, therefore, that the Administrator has waived the requirements expressed in that letter.

As the loan and grant agreement expresses the entire understanding between the City of Coeur d'Alene and the Government the following discussion will be based upon that agreement. Insofar as the amended bill raises questions under the law of the State of Idaho that subject will be left to counsel for the City. This brief is confined to the Federal questions presented.

The amended bill challenges only the purchase by the Government of the bonds issued for the electric system ($300.000) and not those for the waterworks ($204.000).

The loan and grant agreement provides for the purchase of both issues ($504.000) by the Government, if not sold to others. The injunction restrains the sale to the Government only of the $300,000 issue.

THE FEDERAL QUESTIONS PRESENTED

Assuming that the appellee shows a sufficient interest to challenge the constitutionality of Title II, Sections 202 and 203, of N. I. R. A., this suit presents the question whether the National Government, to meet an emergency caused by the collapse of the economic system whereby some ten million workers are without employment and hence lack means of subsistence, may finance the provision of employment by the purchase of bonds of States and public bodies thereof authorized by State law. The Federal Emergency Administration of Public Works, established by the President pursuant to the Authority of Title II of said Act is one of the emergency agencies created by Acts of Congress to restore the functioning of the nation's economic system. That Administration is a planning agency in the field of construction of public works. Its duty is to prepare a comprehensive program of public works (Federal and non-Federal). This program is established by including from time to time such projects when they are found to be socially desirable, provide employment both by direct labor and by the fabrication and transportation of materials, are engineeringly sound, and legally authorized. The prima facie determination of these questions is by the several divisions of the Administrator's staff. The recommendation of these divisions, coordinated by the Deputy Administrator, are presented to the Administrator who, with the advice of the Special

Board of Public Works, composed of Cabinet officers and others appointed to that duty by the President, determines to include or not to include them in the comprehensive program, and if included to finance them (in the case of non-Federal projects) by loans and grants, the loan being a bond purchase sufficient with the grant to finance or aid in financing the cost of the project. The foregoing process results in an allotment which is made to the applicant public body, subject to the execution of a contract satisfactory to the Administrator. The allotment includes a grant not to exceed 30% of the estimated cost of labor and materials employed upon the project (Section 203). This contract, briefly described, provides for the purchase of the applicant's bonds carrying 4% interest and for the payment of the grant as the work is done. Only such bonds are purchased as are not sold to other purchasers. The contract carries conditions effectuating the purposes of the Act (the provision of employment, just and reasonable wages, veterans' and local preference, etc., Section 206). The total allotments made to finance electric projects of cities, counties, districts, and other public bodies to March 16, 1935, aggregated $41,920,131. Certain of these allotments are to finance such projects where nonexclusive franchises to utility companies are in effect. In others the franchises have expired. In a number of instances the allotments are limited to electric works serving only the munici-

pal uses. A number of instances are grants only. Litigation at the instance of utility companies is pending with regard to the allotment or loan and grant agreement to Middlesboro, Kentucky; Hominy, Oklahoma; Burlington, Kansas; Kennett, Missouri; Concordia, Missouri; California, Missouri; Sheffield and Tuscumbia, Alabama; Greenwood County, South Carolina; Florence, Alabama; Trenton, Missouri; La Plata, Missouri; Menominee, Michigan; Coeur d'Alene, Idaho; Independence, Kansas, Columbus, Ohio; Fort Collins, Colorado; Centralia, Illinois; Knoxville, Tennessee. Litigation has been concluded in the case of Allegan, Michigan.

The *Allegan* case (*Allegan* v. *Consumers Power Company,* 71 Fed. (2d) 477) presented the question whether the Power Company's bill showed sufficient interest as a taxpayer to challenge the legality of the loan and grant. The Circuit Court of Appeals of the Sixth Circuit dismissed the bill. Certiorari was denied by the Supreme Court, October 8, 1934.

In *Arkansas Missouri Power Company* v. *City of Kennett, Missouri,* No. 753 in Equity, District Court, Southeastern Division of the Eastern District of Missouri, February 25, 1935, the court granted the defendants' motion to dismiss. (Not yet reported.) Appeal bond of $25,000 required.

In *Missouri Utilities Company* v. *City of California,* 8 Fed. Supp. 454, the United States District

Court (Missouri) granted defendants' motion to dismiss. An appeal is pending.

In *Missouri Public Service Company* v. *Concordia* (Missouri), reported 8 Fed. Supp. 1, the Missouri District Court denied a motion to dismiss. This case is set for trial on the merits.

In *Missouri Public Service Company* v. *Trenton* (Missouri), the District Judge ordered the bill dismissed. Appeal is pending before the Circuit Court of Appeals of the Eighth Circuit, May 8. Appeal was conditioned upon the filing of a bond in the sum of $50,000.

In *Kansas Gas and Electric Company* v. *City of Independence, Kansas,* the District Court of Kansas, Third Division, ordered the bill dismissed. This case was submitted to the Circuit Court of Appeals of the Tenth Circuit, March 26, 1935.

In *Missouri Power and Light Company* v. *City of La Plata, Missouri,* the District Court ordered the bill dismissed. Motion for rehearing is pending.

Bills of the same nature as that in the present case are pending as follows:

Public Service Company of Colorado v. *City of Fort Collins,* United States District Court for Colorado.

Illinois Power and Light Company v. *City of Centralia, Illinois,* United States District Court, Eastern District of Illinois.

Menominee and Marinette Light and Traction Co. v. *Menominee, Michigan.* Proceedings are

pending for removal to the United States District Court for the Western District of Michigan, Northern Division.

The following litigation is pending in the State courts:

Kansas Utility Company v. *City of Burlington, Kansas.* The State Court ordered the bill dismissed. This case is in process of appeal to the Supreme Court of Kansas.

Tennessee Public Service Company v. *City of Knoxville*, pending in the State Court of Knox County.

There is also the suit brought by preferred stockholders of the Alabama Power Company to restrain that Company from performing a contract for the sale of its transmission lines to the T. V. A. (*Ashwander, et al.* v. *Alabama Power Company*). The Tennessee Valley Authority and certain Alabama cities with which the Administrator has made contracts to purchase their bonds are joined as defendants. The District Court, William I. Grubb, J., found the Alabama Power-T. V. A. contract ultra vires, and as the Administrator's contracts for the purchase of the cities' bonds are conditioned upon the purchase of power from the T. V. A. the cities were enjoined from accepting P. W. A. loans and grants by reason of the said condition. Appeal is in process to the Circuit Court of Appeals of the Fifth Circuit.

As stated above, Title II of N. I. R. A. is a part of the legislation adopted by Congress to restore

the functioning of the nation's economic system by appropriations for loans, etc., to finance construction and hence employment.

The legality of the acts creating the emergency agencies referred to is related to the spending power of Congress. The operations of the agencies created are not limited to Federal activities. Vast sums have been applied to improvement of private property or to the promotion of private interests. They are, however, related to the promotion of purposes declared national by the Congress, such as the provision of employment on a national scale.

The importance of the financing of non-Federal projects as an aid to recovery may be estimated from the grand total of estimated costs and man-hours as shown by the report of the Division of Economics and Statistics, P. W. A. as of February 1, 1935. Expenditures to that date excluding railroad loans are $178,701,795. The estimated total cost was $690,065,616. Man-hours applied to that date, 84,629,420. The total estimated man-hours was 318,236,513. The total number of men at work during the month of January was 74,212. This figure reflects the winter season.

ARGUMENT

The performance of the loan-and-grant agreement will cause no legal injury to the appellee

Before plaintiff may challenge the constitutionality of an act of Congress, it must show that

the acts of a Government officer which are claimed to be illegal, threaten direct injury to the plaintiff's legal rights. The rule that a direct injury must be shown as a basis for challenging the constitutionality of an act of Congress has been established by many decisions of the Supreme Court of the United States. In *Frothingham* v. *Mellon*, 262 U. S. 447, the plaintiff attacked the constitutionality of the "Maternity Act" (42 Stat. 224). At page 488 the court said:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other. * * * We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. *That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.* Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of

> the enforcement of a legal right. *The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement*, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding.

Cited with approval *Williams* v. *Riley,* 280 U. S. 78, 80.

In *Heald* v. *District of Columbia,* 259 U. S. 114 (1922), the plaintiff challenged the constitutionality of an act of Congress levying a tax on intangible property of the residents of the District of Columbia. The challenge was that the scope of the tax included municipal bonds but it did not appear that the plaintiff had any such bonds. Mr. Justice Brandeis, speaking for the court, said, p. 123:

> It has been repeatedly held that one who would strike down a State statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. (Citing cases.) In no case has it been held that a different rule applies where the statute assailed is an act of Congress nor has any good reason been suggested why it should be so held.

Fairchild v. *Hughes,* 258 U. S. 126, was an attack on the constitutionality of the Suffrage Amendment (the 19th). The court said, p. 129:

> Plaintiff's alleged interest in the question submitted (the validity of alleged acts of ratification by the States) is not such as to afford a basis for this proceeding. It is frankly a proceeding to have the Nineteenth Amendment declared void. In form it is a bill in equity but it is not a case within the meaning of paragraph 2 of Article III of the Constitution which confers judicial powers on the Federal courts, for no claim of plaintiff is "brought before the court for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights or the prevention, redress, or punishment of wrong." * * * Plaintiff has only the right possessed by every citizen to require that the Government administer according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the Federal courts a suit to secure by indirection a determination whether a statute if passed, or a constitutional amendment about to be adopted, will be valid.

It is well established that it is not the province of the Federal courts to determine questions of law *in thesi.* There must be a litigation upon actual transactions between real parties growing out of a controversy affecting legal or equitable rights as to

person or property. *Marye* v. *Parsons,* 114 U. S. 325, 330.

In *Muskrat* v. *United States,* 219 U. S. 346, at 361, 362, the Supreme Court declared:

> That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. * * *

See also *New Jersey* v. *Sargent, Attorney General,* 269 U. S. 328, 330–334.

From a review of the decisions of the Supreme Court requiring that a plaintiff attacking the constitutionality of an act of Congress show that he has suffered some direct injury, it would seem that an injury to any legal or equitable right (that is an unlawful invasion of such right) cannot result from Federal expenditures. In the

Mellon case the court said the constitutionality of an act of Congress "may be considered only when the justification for some direct injury suffered or threatened presenting a justiciable issue is made to rest upon such an act." Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment which otherwise would stand in the way of an enforcement of a legal right. In other words, even a direct injury to some right of the plaintiff cannot be prevented by the courts if such injury has the justification of a valid act of Congress. But here there is a lack of injury and hence no need for justification. What the plaintiff will suffer from the competition of the defendant city is a possible loss of business in a competitive market through the city's competition—a mere *damnum;* and even this *damnum* does not arise from the performance of the loan and grant agreement. The *damnum,* if any, results from the exercise of the city's right to compete with the company invested in the city by the law of Idaho. The competitive advantage, if any, of the city, arises from the improvement in the arts since the establishment of the plaintiff's system, freedom from the necessity of earning a profit, and lower financing costs through the loan and grant. But the plaintiff below has no legal right to any particular inter-

est rate or terms of financing. It may be that the 4% rate and the grant provided by the agreement is less than the market rate from private lenders. But if the private interest rate were equal to or lower than the Government rates the *damnum* to the plaintiff would be the same.

The Supreme Court speaks of "justification" and of the "enforcement" of the statute which negatives the injury. Obviously a loan or grant which the borrower is free to accept or not cannot "injure" a third party. A statute which, like Sections 202 and 203, constitutes directions to the Executive as to the expenditure of an appropriation is not an enforcing statute. The fact is that (no tax liability being created) a Federal contribution to a public enterprise authorized by state law cannot be an "injury" to anyone.

It is not the law that a loan or a gift to an enterprise, whether that of a municipality or other person or corporation, to aid it in financing a project competitive with a private corporation is a legal injury to such corporation. The mere statement of such a principle carries its denial. If such a private loan or grant cannot constitute a legal injury, it is difficult to understand why one from the Government should do so.

Appellee maintains that the performance of the said agreement will cause it injury in each of two capacities, first, as a public utility company holding a nonexclusive franchise empowering it to sell

electrical energy in the City of Coeur d'Alene to such persons as may wish to buy it, and, second, as a taxpayer threatened with an assessment by the City to repay to the Government the proceeds of an illegal loan and grant.

The franchise referred to is set out as Exhibit B to the amended bill (Tr. p. 84 et seq.). It grants the right to the Consumers Company (appellee's predecessor) of furnishing the Village of Coeur d'Alene and the inhabitants thereof with electricity, with lighting, heating power, and other purposes for which it may be adapted, for the period of fifty years from the date thereof (October 19, 1903).

Such franchises have been construed to be nonexclusive. Appellee makes no contention that this franchise grants it a monopoly.

The appellee relies, however, upon the doctrine of "illegal competition" first declared in *Arkansas Missouri Power Company* v. *City of Campbell,* 55 Fed. (2d) 560. In that case the plaintiff was the holder of a nonexclusive franchise which, however, was held exclusive "against anyone who assumed to exercise the privileges granted plaintiff in the absence of authority or in defiance of law." In the *Campbell* case the particular in which the City of Campbell assumed to exercise such a privilege in defiance of law was a provision of the contract with the contractor for construction which required the City to exercise its taxing power. The law of

Missouri did not authorize it to exercise that power in the circumstances presented.

The Judge who wrote the decision in the *Campbell* case, the Honorable C. J. Faris, has recently had occasion to determine the application of the doctrine there stated in a suit challenging the legality of a Federal loan and grant. (*Arkansas Missouri Power Company* v. *City of Kennett,* No. 753 in Equity, District Court of the United States, Southeastern Division, Eastern District of Missouri), February 25, 1935. On the subject of the standing of the plaintiff to attack the validity of Sections 202 and 203 and the loan and grant to the City of Kennett the court said:

> May plaintiff attack, in the action at bar, the validity of Sections 202 and 203, *supra,* because it has valuable property in the City of Kennett, which will be depreciated in value, if not wholly destroyed, if the City of Kennett shall construct and operate the proposed municipal plant? I am of the view that this is the decisive question here; because, if defendant Ickes, acting under a valid statute, may buy these bonds of, and award this gratuity to, the defendant City, the case is ended in favor of the defendants. The Bonds are valid; the City has the legal right to issue them and to sell them anywhere it can find a purchaser, as, also, the power to use the proceeds thereof to erect, and thereafter maintain and operate the plant, and to furnish therefrom to itself and to its citizens electrical energy. The objection urged by

plaintiff goes only to the purchaser and to his legal right to lay out public money in the manner and for the purposes contemplated.

If plaintiff shall be hurt, and it must be assumed, for the uses of the motion (to dismiss the suit), that it shall be, will that hurt be a necessary and direct consequence of what defendant Ickes purposes to do, or what the City has the legal power to do and purposes doing? In short, is the contemplated injury the act of Ickes under the federal statute attacked, or the act of the City? Clearly, the latter. For, even if the two sections of the National Industrial Recovery Act challenged here by plaintiff had never been passed, the City of Kennett could, and undoubtedly would, have built the plant with the selfsame proceeds of the bonds herein, which it would have sold to some other buyer.

If it be urged that the $30,000 gratuity is not in the same category as the purchase of the $120,000 of bonds, the answer is that it fairly appears that the issue of $140,000 in bonds was, when the matter was begun, deemed sufficient to build the plant, and that the present arrangement is a mere fortuitous thing.

So, the action here, even if it can be maintained, is a mere stop gap. It settles nothing of any value to plaintiff, and can afford plaintiff no permanent relief.

In the case of *City of Campbell* v. *Arkansas-Missouri Power Company*, 55 Fed.

(2d) 560, greatly relied on by plaintiff here, the right to issue the bonds there in question and to lay the tax with which to pay them, was wholly vulnerable. Plaintiff there had an existing franchise (if that be relevant); the City of Campbell was trying to do an act in the teeth of the Constitution of Missouri, which unlawful act would result in the injury of the plaintiff there. In the case at bar the situation is wholly different. The attack is here made on the buyer of the bonds, not on the City, the act of which alone causes the hurt to plaintiff, but which is itself legally invulnerable. The action here will settle nothing finally. If carried by plaintiff to a successful conclusion, such conclusion will stop the defendant City in doing the act hurtful to plaintiff only until it shall be able to find another buyer for its bonds.

I repeat, I am mindful, of course, that a gift of $30,000 is involved, but it must be borne in mind, as said already, that the total issue of bonds voted amounted to $140,000; so, it is obvious that the failure of the gift would not afford an insurmountable barrier to the construction of the plant. It appears from the contract that the difference perhaps involved arises from divers conditions put by the proposed agreement on labor, hours, and material.

So, I am driven to the conclusion that plaintiff's hurt will accrue directly from an act which the City of Kennett purposes do-

> ing, and which it has the legal power to do, and that the hurt from the threatened act of defendant Ickes is fortuitous merely, and not at all the direct cause of the thing of which plaintiff complains.

The injury which the appellee must show as a basis for its suit is an unlawful invasion of some legal right. The injury which the appellee claims here is not a legal injury but a mere *damnum*. It has no monopoly in Coeur d'Alene. Its business there has always been subject to the risk of municipal competition. The City has now and has long had a right conferred on it by the laws of Idaho to construct and operate a municipal electric system in competition with the Washington Water Power Company. Whatever loss the Company may suffer by reason of the City's competition is not the result of an invasion of any right to be free of such competition, for such right does not exist.

Furthermore, the loss or *damnum* which the Company may suffer does not result from the Administrator's loan and grant. As pointed out by Judge Faris it results from the freedom of the City to compete. By the loan and grant agreement the Administrator agrees to buy such bonds as the City may not sell to others. The City is free to sell to others and may do so. If it does the resultant *damnum* would be precisely the same. A loan (ultra vires of the lender's powers or not)

to a competitor has never been regarded as a legal injury to another competing in the same field.

Neither is the grant the cause of the *damnum* to the Company. If it be not the cause its legality or illegality (ultra vires of the grantor's powers) is immaterial.

The doctrine of the *Campbell* case has been followed in a number of cases but in each of them the illegality which supports a suit to enjoin municipal competition is an illegality inherent in the City's action. No case appears in which that illegality is not the illegal exercise of the City's taxing power.

In *Railroad Company* v. *Ellerman,* 105 U. S. 166, the Supreme Court had before it a situation analogous to that presented by this case. The City of New Orleans had made a contract with Ellerman empowering him to keep in repair certain municipally owned wharves and to collect certain charges. The Railroad Company, by authority of an act of the General Assembly of Louisiana, made available to shippers, exempt from the payment of all levies and wharf dues due the City of New Orleans, a wharf owned by the Railroad Company. The effect of this action was to open a rival wharf in competition with Ellerman free of burdens which Ellerman's customers were required to bear. The court determined that Ellerman had not a sufficient legal interest to entitle him to enjoin the Company from using its wharf as a public wharf free

of the City's charges. The court said as the competition was not illegal Ellerman had no such interest. The claimed illegality consisted in the allegation that such use of the Railroad's wharf was *ultra vires* of the Railroad Company's powers. The court said:

> But if the competition in itself, however injurious, is not a wrong of which he (Ellerman) could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires?* The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for anyone to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. * * * The only injury of which he (Ellerman) can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is that a violation of its

> charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed (pp. 173–174).

In *City of Paragould* v. *Arkansas Utilities Company,* 70 Fed. (2d) 530, the court says that—

> Grants of special franchises and privileges are to be strictly construed in favor of the public right and nothing is to be taken for granted concerning which any reasonable doubt may be raised. (Citing *Louisville Bridge Co.* v. *U. S.,* 242 U. S. 409.)

Gambles v. *P & R. R. R. Co.,* Fed. Cases No. 2331; *New England R. Co.* v. *Central R. & E. Co.,* 69 Conn. 56, 36 Atl. 1061; *Burns* v. *St. Paul,* 101 Minn. 663, 112 N. W. 412 (1907); *Fletcher Cyc. Corp.,* Vol. 3, Sec. 1528.

The appellee will doubtless rely upon *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515. It there appeared that by a statute of Oklahoma, passed in 1915, cotton gins were declared to be public utilities, to be operated under permits from the State Corporation Commission. No gin could be operated without a license from the Commission and a satisfactory showing of public necessity. In 1925 the Legislature added a proviso whereby gins run cooperatively were to be given a license free of a showing of public necessity. The plaintiff Frost, who had been required to make such a showing, brought suit to enjoin the issuance of the license upon the ground that the proviso

was invalid, as contravening the due process and equal protection of the law clauses of the Fourteenth Amendment. The court held that the right to operate a gin and collect tolls therefor, as provided by the Oklahoma statute, was not a mere license but a franchise, and constituted a property right within the protection of the Fourteenth Amendment; that, while the right acquired did not preclude the State from making similar valid grants to others, it was exclusive against any person attempting to operate a competing gin without a permit or under a void permit and that a suit in equity by a licensee would lie against an invasion of his rights under the franchise.

In the present case the City of Coeur d'Alene has never been required to obtain a certificate of convenience and necessity. The appellee would have no rights whatever in Coeur d'Alene in the absence of action of the City giving it a right to the use of the streets or otherwise. Frost was not under the necessity of obtaining any local consent to the operation of his gin.

The Circuit Court of Appeals of the Eighth Circuit had occasion in *City of Paragould* v. *Arkansas Utilities Company, supra,* Sanborn, J., to ascertain the effect of the *Frost* case. In the *Paragould* case the Utilities Company had an indeterminate permit for which it had surrendered its nonexclusive fifty-year franchise under which the City retained the right to grant similar franchises to others and

to build its own plant. The indeterminate permit authorized the Company to "operate said electric light and power plant and distribution system within said City of Paragould, Arkansas, subject to all the terms, conditions, and limitations prescribed in Act No. 571 of the regular session of the 19th General Assembly of the State of Arkansas." At the time the Company received its indeterminate permit the law of Arkansas required a City to obtain a certificate of convenience and necessity as a condition precedent to its engaging in the electric business. A few days after such permit was received, the General Assembly of the State amended the law whereby the necessity of a certificate to a city was abolished. The suit was to enjoin the municipality from building its competing power plant. The court dismissed the injunction granted below and remanded the case with directions to dismiss the bill, p. 535. It states the question before it as follows (p. 532):

> * * * whether, after the passage of Act No. 124 (the act abolishing the necessity for a certificate of convenience and necessity by a city), the Arkansas Light & Power Company and its successor, the Utilities Company, retained the right to the conditional immunity from competition provided by section 13 of Act No. 571 and which the General Assembly obviously attempted to take away by repealing that section.

The court states that the universal rule is applicable to such cases—

> * * * that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised. *Louisville Bridge Co.* v. *United States,* 242 U. S. 409. Only that which is granted in clear and explicit terms passes by a grant of property, franchise, or privileges in which the government or the public has an interest. *Coosaw Mining Co.* v. *South Carolina,* 144 U. S. 550. "So strictly are private persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it had given to the plaintiff was held not to preclude the city itself from building waterworks of its own. *Knoxville Water Co.* v. *Knoxville,* 200 U. S. 22." (The court then cites a number of Supreme Court cases to the same effect, p. 533. The opinion proceeds:)
>
> The question which confronts us appears to have been answered by the Supreme Court of the United States adversely to the claim of the appellee. In the case of *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515, it appears that, by a statute of Oklahoma passed in 1915, cotton gins were declared to be public utilities to be operated under permits from the State Corporation Commission. No gin could be operated

without a license from the Commission and a satisfactory showing of public necessity. In 1925, the Legislature added to the section requiring such a showing this proviso: "Provided, that on the presentation of a petition for the establishment of a gin to be run cooperatively, signed by one hundred citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin." Frost had acquired a license to operate a gin at Durant, Okla. A cooperative gin company made application for a similar license. Frost protested against the granting of such permit. The Commission, at the hearing, held that, although there was no showing of public necessity, it was required, under the proviso, to grant a license. Frost then brought suit to enjoin the issuance of the license upon the ground that the proviso was invalid as contravening the due process and equal protection of the law clauses of the Fourteenth Amendment. The court held that the right to operate a gin and collect tolls therefor, as provided by the Oklahoma statute, was not a mere license, but a franchise and constituted a property right within the protection of the Fourteenth Amendment; that, while the right acquired did not preclude the state from making similar valid grants to others, it was exclusive against any person attempting to operate a competing gin without a permit or under a void permit; and that a suit in

equity by the licensee would lie against an invasion of his rights under the franchise. It was further held that the proviso was invalid as denying to Frost the equal protection of the laws. The court then considered the effect of the invalidity of the proviso upon the substantive provisions of the statute which it qualified, and held that, if the effect of the proviso was to destroy the entire section of the law requiring a showing of public necessity, then Frost would be entitled to no relief, "since, in that event, although the proviso be bad, the inequality created by it would disappear with the fall of the entire statute and no basis for equitable relief would remain." This, it seems to us, is equivalent to saying that if the Legislature had destroyed or repealed the section providing for the limited immunity from competition, Frost could not have maintained his suit, and there would have been no violation of the Fourteenth Amendment and no right which Frost could have protected.

It might, perhaps, be urged that the court was considering only the inequality created by the proviso, and not whether the section of the law providing for a showing of public necessity was a part of Frost's franchise. But that question was involved in the case, since the very purpose of Frost's suit was to protect his franchise, which he contended included the right to conditional immunity from competition. This clearly appears from

the dissenting opinion of Mr. Justice Brandeis, who on page 533 of 278 U. S., says: "Frost claims on another ground that his constitutional rights have been violated. He says that what the statute and the Supreme Court of Oklahoma call a license is in law a franchise; that a franchise is a contract; that where a constitutional question is raised this court must determine for itself what the terms of a contract are; and that this franchise should be construed as conferring the right to the conditional immunity from competition which he claims. None of the cases cited lend support to the contention that the license here issued is a franchise. They hold merely that subordinate political bodies, as well as a Legislature, may grant franchises; and that violations of franchise rights are remediable, whoever the transgressor. Moreover, the limited immunity from competition claimed as an incident of the license was obviously terminable at any moment. Compare *Louisville Bridge Co.* v. *United States,* 242 U. S. 409. It was within the power of the Legislature at any time after the granting of Frost's license, to abrogate the requirement of a certificate of necessity, thus opening the business to the competition of all comers." Mr. Justice Stone, in his dissenting opinion, on page 551 of 278 U. S., says: "Whether the grant appellant has received be called a franchise or a license would seem to be unimportant, for in any case it is not an exclusive privilege. Under

> the Constitution and laws of Oklahoma the Legislature has power to amend or repeal the franchise, Constitution of Oklahoma, art. 9, sec. 47; *Choctaw Cotton Oil Co.* v. *Corporation Commission*, 121 Okla. 51, 247 P. 390; and injury suffered through an indefinite increase in the number of appellant's competitors by nondiscriminatory legislation, would clearly be damnum absequc injuria."
>
> It seems to us, in the light of the decision in the Frost case, that the contention of the appellee here that section 13 of Act No. 571 became perpetually a part of its franchise and contract with the state of Arkansas cannot be sustained, and that it must be held that section 13 constituted nothing more than a barrier erected by the state between the persons who received indeterminate permits under Act No. 571 and those who might wish to compete with them, which barrier the state might raise, lower, or completely remove, provided that this was done through nondiscriminatory legislation.

The plaintiff below relied upon and the District Court adduced in its opinion *Walla Walla* v. *Walla Walla Water Company,* 172 U. S. 1, as authority for the contention that a direct injury will be caused to plaintiff if the performance of the loan and grant agreement is not enjoined. The decision is inapplicable to the controversy here. It there appeared that the City had granted a franchise to the Company whereby the City

agreed not to establish its own water system unless and until a court of competent jurisdiction decided that the Company was not performing its contract. Without any such decision the City proceeded to sell bonds to finance the construction of its own system. The court said there was an impairment of the obligation of the contract. The main contention of the City was that the Fourteenth Amendment did not apply to a City acting in a proprietary and not in a governmental capacity. The court denied this contention.

In the present case it is not claimed by the appellee that it has a contract whereby the City is inhibited from establishing and operating its own system.

Boise Artesian Hot & Cold Water Co. v. *Boise City,* 230 U. S. 84, was also relied upon by the plaintiff below. That case involved the constitutionality under the *contract* clause of the Federal Constitution of an ordinance of the City effecting a franchise for using the City streets for water-supply purposes and the liability of the City for water supplied to it. The suit was one of the Company to recover from the City for water furnished for fire purposes. The defense was that the Company was under a statutory obligation to furnish such water free and that the City was under no legal obligation to pay because there was neither ordinance nor contract for the water claimed to have been furnished. The City alleged by way of counter claim

that the Company was liable for a large sum of money claimed to be due for license fees for the use of the streets. The Company denied the validity of the ordinance imposing the license fees as in violation of its "vested street easement and in contravention of the Constitution of the United States." The Supreme Court reversed the judgment and remanded the case for further proceedings for the error in charging the jury that the ordinance of June 17, 1906, was valid in law and that from the amount found to be due to the Water Company there should be deducted the amount of the counterclaim of the City.

In *Iowa Southern Utilities Company* v. *Cassill,* C. C. A., 8th Circuit, 69 Fed. (2d) 703, the claimed illegality consisted in an illegal exercise of the City's taxing power. The court denied the contention and dismissed the bill.

In *Missouri Public Service Company* v. *City of Concordia* (Mo.), 8 Fed. Supp. 1 (also urged by the plaintiff below and cited by the court), the District Judge denied the defendants' motion to dismiss. The opinion, however, does not show in what way the proposed loan and grant would cause any direct injury to the plaintiff. The court says:

> It would follow that, upon the clear and explicit allegations of the bill in this case, the plaintiff has and enjoys a property right within the city of Concordia, and that such property right is within the protection of the Fourteenth Amendment. If, therefore,

> the defendants are about to act in such manner as to take such property without due process of law, the plaintiff is entitled to the protection of the federal court under constitutional warrant.

The opinion will be searched in vain for anything supporting the court's conclusion that the loan and grant would cause injury to plaintiff. The court cites the *Campbell* case, but, as has been said, that case is authority for the proposition only that if the taxing power is illegally exercised the proposed competition is illegal. Here the claimed illegality is not in the city's action but the financing thereof by a third party.

What the appellee has attempted to do in this case is to enlarge "illegal competition" to include as enjoinable illegality *ultra vires* action of a lender. Restrictions by legal implication on the ability of cities to exercise powers given them by State laws are not favored by the Supreme Court.

In *Puget Sound Light, etc., Company* v. *City of Seattle,* 291 U. S. 619, the Supreme Court denied the asserted right of the plaintiff to require that the City refrain from taxing it where it was a competitor with the City.

In *Joplin (Mo.)* v. *Southwest Missouri Light Company,* 191 U. S. 150, the Supreme Court refused to imply from the company's nonexclusive franchise that the city was precluded from erecting its own lighting plant. The court said:

> The limitation contended for is upon a governmental agency and restraints upon that must not be readily implied * * *. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the power of government. Many cases illustrate this principle (p. 155). (Citing *Skaneatales Waterworks Company* v. *Skaneatales,* 184 U. S. 354; *Bienville Water Supply Company* v. *Mobile,* 175 U. S. 109, 186 U. S. 212.) *Walla Walla* v. *Walla Walla Water Company,* 172 U. S. 1, is not in opposition to these views. * * *

In *Madera Waterworks* v. *Madera* (California), 228 U. S. 454, Mr. Justice Holmes, speaking for the court, denied the contention of the Company that its privilege granted by State law to use the public streets for the purpose of supplying water imported a contract that the corporation constructing the works, as invited, should not be subject to competition from a public source. He said:

> * * * There is no pretense that there is any express promise to private adventurers that they shall not encounter subsequent municipal competition. We do not find any language that even encourages that hope, and the principles established in this class of cases forbid us to resort to the fiction that a promise is implied.
>
> The possibility of such a ruinous competition is recognized in the cases and is held not sufficient to justify the implication of a contract (citing cases). So strictly are pri-

> vate persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it had given to the plaintiff was held not to preclude the city itself from building waterworks of its own. *Knoxville Water Co.* v. *Knoxville,* 200 U. S. 22, 35.

It is true that the foregoing cases were based upon the contention of the utility that a contract existed, whereas here the appellee bases its claim upon "illegal competition." Nevertheless the above citations show it is not the disposition of the court to construct by analogies from the law of fair competition or other analogies limitations on the power of cities to provide and operate their own facilities.

In *High* v. *City of Harrisonville,* 325 Mo. 549, 41 S. W. (2d) 155, adduced by Judge Reeves as authority for his conclusion that the City's plant is "illegal competition" it was conceded that the City had reached the constitutional limit of indebtedness and that the debt created by the contract was within the purview of Section 12, Article X of the Constitution. The court found that the contract required the City to buy its own current and pay for it with funds derived from taxation. It says:

> The record shows the City had no funds available for such purpose. If it purchases, its own current funds for that purpose must come from funds raised by taxation or from a fund which must be replenished from funds raised by taxation (p. 159, S. W. Rep.).

The court below in the opinion says that the plaintiff—

> * * * will, or is in immediate danger of, suffering direct injury by reason of the consummation of the plan by the City with the Government. The bill states that as a franchise holder and taxpayer in the City, the plaintiff has an investment in its system of more than Five Million Dollars in Idaho, and more than Two Hundred Thousand Dollars in the City, and pays Government, State, County, and City taxes in large amounts; that the plan covering the acquiring and construction of the system calls for an expenditure of $337,580.00, which has been approved by the Administrator and the contract already executed by the City for a loan and grant and which exceeds the amount authorized by the ordinance and voters of the City; that such amount would be insufficient to complete the plant and will leave an incomplete and inadequate plant requiring the levying by the City of a large amount in taxes to complete it; that the plan is unsound from an economic standpoint and will not eliminate unfair competitive practices, but will tend to promote unfair and illegal competition which will result in a destruction of its property rights and deprive it of the right to continue furnishing electric light and power to the adjacent cities and territories of Northern Idaho, which are connected with its system in the City of Coeur d'Alene. From these and other facts ap-

> pearing in the bill it would seem that the plaintiff has sufficient amount of interest and will suffer injury by reason of the adoption of the plan and construction of the system, and would as a taxpayer be subjected to the payment of an illegal tax if the loan and grant are unauthorized, to entitle it to question the legality of the plan.

As to the plaintiff's injury by reason of the adoption of the plan and construction of the system and as to plaintiff's alleged injury through the insufficiency of the estimate and the prospective tax to complete the system, the sufficiency of such estimates is a matter for the City officers. This, however, is a local question and is left to counsel for the City.

In *Missouri Utilities Company* v. *City of California, et al.,* 8 Fed. Supp. 454, the learned Judge said on this point (p. 465):

> Taking as true the facts alleged in the bill, it must be conceded that the plaintiff has a valuable property in the city of California, including the right, but not the exclusive right, to sell electric current in that city. It must be conceded that the value of its property will or may be lessened if a competing plant is erected and operated just as the value of an office building may be lessened if another office building is erected to serve the same public. It must be conceded that the city of California has the right, if it proceeds according to law, to build

and operate a municipal light plant, although it will compete with, and may altogether destroy the value of, the plaintiff's plant. Arguendo only, it will be conceded that the United States had no right to make a grant to the city of California to aid it in the erection of its municipal plant.

How can it be said that the United States has taken or will take plaintiff's property by granting money to the city of California for the building of a municipal plant? Clearly it is not the grant which hurts the plaintiff. The plaintiff is injured by the building and operation of the plant, and those are acts of the city of California.

If John D. Rockefeller had given money to California with which to build a plant, would it be said that he had taken plaintiff's property?

If financing the construction of a municipal plant is the taking of the property of a private plant, it is equally so whether the financing is by way of gift or loan. Would anyone contend that every purchaser of a municipal bond whose purchase money goes toward the erection of a municipal plant has taken the property of a privately owned competing plant?

If the plaintiff owned a library in the city of California and made a profit by renting books to the public, and if then Andrew Carnegie gave money to the city for the building of a free library, would Andrew Carnegie have taken plaintiff's property?

> Clearly these questions must be answered in the negative. If the plaintiff will be deprived of its property, it will be deprived of its property by the city of California and not by those, including the United States, who by loan or grant or gift or purchase of bonds have financed the city. So there is no support whatever for the contention that by title 2 of the National Industrial Recovery Act plaintiff has been directly injured through a taking of its property in violation of the Fifth Amendment. Plaintiff, therefore, has no standing on that ground to question the validity of that Act.

Appellee shows no threatened injury to it as a taxpayer

The claim is that the loan and grant being illegal the United States will sue to recover the proceeds thereof and that the appellee will be taxed to pay the judgment. This contention has been disposed of by *City of Allegan* v. *Consumers Power Company,* 71 Fed. (2d) 477, certiorari denied October 8, 1934; *Missouri Utilities Company* v. *City of California, supra; Arkansas Missouri Power Company* v. *City of Kennett, supra.*

Summary

The bill of plaintiff below fails to show that it has capacity to attack the constitutionality of Title II, Sections 202 and 203:

1. There is no causal relation between the loan and grant in aid of an exercise of the city's right to compete and the prospective *damnum.*

2. The loan and grant invade no right of the plaintiff. It has no right to be free of a loan to the city by private lenders or of a gift from private lenders. Neither has it any right to be free of a loan or grant from the Government.

3. The city's action is legally impregnable. Its plan does not include "illegal competition" on its part. No illegal resort to its taxing power is asserted. The only illegality charged is that the loan and grant is *ultra vires* of the United States. This is not an "illegality" within the doctrine of the *Campbell* case or any case following that doctrine.

4. The plaintiff's claim of threatened injury through a prospective assessment on it as a taxpayer to repay the loan and grant is fantastic.

The loan and grant to the city are authorized by title II

Section 202 of Title II of the National Industrial Recovery Act requires the Administrator, under the direction of the President, to prepare a comprehensive program of public works, which shall include, among other things, the following:

> (a) construction * * * of any publicly owned instrumentalities and facilities * * *, (c) any project of the character heretofore constructed or carried on, either directly by public authority or with public aid, to serve the interests of the general public.

The challenged projects are publicly owned instrumentalities and facilities. They are also of the

character "heretofore constructed and carried on directly by public authority."

Section 203 (a) provides:

> With a view to increasing employment quickly (while reasonably securing any loans made by the United States), the President is authorized and empowered, through the Administrator * * * to * * * finance, or aid in the financing, of any public works project included in the program prepared pursuant to Section 202.

Section 203 (a) (2) provides:

> The President is empowered through the Administrator to * * * make grants to states, municipalities, and other public bodies for the construction, repair, or improvement of any such project but no such grant shall be in excess of thirty per centum of the cost of labor and materials employed upon such project.

The said projects have been included in the comprehensive program and the loan and grant authorized by resolution of the Special Board of Public Works, of which the Administrator is Chairman, as stated above.

It appears, therefore, that the loan and grant agreements challenged are authorized by the Act by the executive officers duly authorized by Congress to enter into and to perform them.

Title II, sections 202 and 203, is a constitutional enactment

Article I, Section 8, of the Constitution empowers Congress to lay and collect taxes to pay the debts and provide for the general welfare of the United States (Clause 1), to borrow money on the credit of the United States (Clause 2), to make all laws which shall be necessary and proper for carrying into execution the powers conferred in Section 8, and all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof (Clause 18). Article IV, Section 3, empowers Congress to dispose of property of the United States.

Title II of the Recovery Act, approved June 16, 1933, is a constitutional exercise of the said powers. Sections 211 to 219 lay taxes or amend revenue acts. Section 210 authorizes the Secretary of the Treasury to borrow such amounts as may be necessary to meet the expenditure authorized by said Act. Sections 202, 203, and 208 state what expenditures (among others) are so authorized. They are the expenditures of the agency created to effectuate the purposes of Title II, to wit, the Federal Emergency Administration of Public Works (Section 201); the expenditures of the agency necessary to effectuate the purposes of Title I, the National Recovery Administration (Title I, Section 2); those necessary to effectuate oil regulation (Section 9); those necessary in connection

with the preparation of the comprehensive program of public works (Section 202); those necessary in order, "with a view to increasing employment quickly", to finance or aid in the financing of any public works project included in the comprehensive program, including a grant to "public bodies" of not to exceed 30% of the cost of labor and materials employed upon such project (Section 203); grants aggregating $400,000,000 to highway departments of the several states (Section 204); allotment of not less than $50,000,000 for national forest highways, etc. (Section 205); making available $25,000,000 to the President for making loans for and otherwise aiding in the purchase of subsistence homesteads (Section 208).

Section 220 authorizes to be appropriated out of any money in the treasury not otherwise appropriated the sum of $3,300,000,000.

The Fourth Deficiency Act, fiscal year 1933 (Public No. 77, 73d Congress), under the heading "Executive Office and Independent Establishments," provides:

> For the purpose of carrying into effect the provisions of the Act entitled (National Industrial Recovery Act, approved June 16, 1933) and also for the purpose of an act for the relief of unemployment, approved March 31, 1933, and for each and every object thereof, to be expended in the discretion of the President, to be immediately available, and, except as heretofore provided, to

> remain available until June 30, 1935, $3,300,000,000.

The Emergency Appropriation Act approved June 19, 1934, Title II, "Emergency Appropriations—Executive" provides:

> For an additional amount for carrying out the purposes of the Act entitled (the Act approved March 31, 1933, for the relief of unemployment); the Federal Emergency Relief Act of 1933, approved May 12, 1933 * * *; The Tennessee Valley Authority Act of 1933, approved May 18, 1933 * * *; and the National Industrial Recovery Act, approved June 16, 1933 * * *; $899,675,000 to be allocated by the President for further carrying out the purposes of the aforesaid Acts and to remain available until June 30, 1935 * * *.

The title of the National Industrial Recovery Act is "An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes."

Title I, Section 1, provides ("Declaration of Policy"):

> A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy

> of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

Title II is entitled "Public Works and Construction Projects—Federal Emergency Administration of Public Works." Title II of the Recovery Act is thus an act levying taxes, authorizing an appropriation, prescribing purposes for which expenditures are authorized, and empowering the creation of an agency by the President to effectuate the purposes of the act.

Pursuant to this authority, the President has established the Federal Emergency Administration of Public Works (Executive Orders No. 6174, June 16, 1933; No. 6198, July 8, 1933; No. 6252, August 19, 1933; and No. 6929, December 21, 1934).

In Title II of the Recovery Act Congress found and declared the following (among others) to be national purposes:

(a) The preparation of a comprehensive program of public works to include non-Federal as well as Federal projects. This program is to include not only the continental United States, but Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

(b) The quick increase of employment by means of Federal construction or Federal aid in financing the construction of projects included in the comprehensive program.

(c) The promotion of the thirty-hour week and consequent spreading of employment.

(d) Increasing purchasing power by requiring the payment of just and reasonable wages.

(e) Preference for veterans in the employment of labor on P. W. A. projects.

National purposes are further declared by Section 1 of Title I—"* * * to promote the fullest possible utilization of the present productive capacity of industries, to increase the consumption of industrial and agricultural products by increasing purchasing power * * * to rehabilitate industry and to conserve natural resources."

The means which Congress has adopted to effectuate the said purposes are, among others, by authorizing the Executive to allot Federal funds to Federal agencies to finance construction of such public works as he deems worthy of inclu-

sion in the comprehensive program and to make loans and grants to States and public bodies to finance the construction, repair or improvements of such of their public works as he deems worthy of such inclusion and in his judgment promote the declared national purposes.

Title II, Sections 202 and 203, is not legislation prescribing rules of conduct for the people of the United States, or for any of them, but authority to the Executive to expend on prescribed conditions the appropriation authorized for the primary purpose of providing employment on a national scale.

Under the power to lay and collect taxes to provide for the common defense and general welfare of the United States, to borrow money on the credit of the United States (and by necessary implication to expend the moneys collected from taxes or borrowed) to dispose of the property of the United States, and to make all laws which are necessary and proper for carrying into execution the powers expressly conferred upon Congress, Congress may declare and has continuously, since the foundation of the Government, declared certain purposes national and promotive of the general welfare of the United States and has appropriated Federal funds and property to further them.

An extensive and detailed enumeration and discussion of the exercise of this power of Congress

appears in an article by Edward S. Corwin, entitled "The Spending Power of Congress—apropos the Maternity Act", *36 H. L. P.* p. 548. The more prominent instances in which Congress has levied taxes and made appropriations or disposed of property of the United States to promote purposes deemed by it national although not within subject matters, which the Constitution specifically authorizes Congress to regulate are:

1. *Federal grants to States in aid of education.*—There is no express clause of the Constitution authorizing such grants unless it be the power to dispose of the property of the United States. Nor is Congress empowered to *regulate* education. Among the early instances of the exercise of the power of Congress to appropriate money and to dispose of national property for the general welfare of the United States is the Act admitting Ohio into the Union, by which in return for a grant of lands to each township for free schools, and other concessions, Ohio was required not to tax public lands sold within its borders for five years after sale. Here Congress granted national lands to provide free schools. The Act of July 2, 1862 (12 Stat. 503), granted Federal Public lands to the States in return for their pledge to establish colleges. In 1890 Congress made donations to each State and territory for the more complete endowment and maintenance of colleges for the benefit of agriculture (26 Stat. 417). These donations were derived

from the proceeds of sales of Federal public lands. In 1900 Congress began to make appropriations from general funds for aid of education in the States. By the Smith-Lever Act of 1914 (38 Stat. 372) Congress began the policy of making appropriations for the promotion of agricultural extension work in the States and territories. This Act requires the matching of the appropriations made by the States. The Smith-Hughes Act of 1917 (39 Stat. 929) authorizes appropriations later amounting to about $7,000,000 per annum to the States to aid them in the paying of salaries and the training of teachers of agricultural and industrial subjects and of home economics. The Act of 1920 authorizes the appropriation after 1921 of $1,000,000 annually in cooperation with the States in the vocational rehabilitation of persons disabled in industry (41 Stat. 715). The Act of March 3, 1879 (20 Stat. 468), and June 25, 1906 (34 Stat. 460), appropriated large sums to the American Printing School for the Blind at Louisville, Kentucky.

2. *Grants in aid of safeguarding maternity.*— Professor Corwin's article was specifically directed to the Maternity Act of November 23, 1921 (42 Stat. 224), which provides for an appropriation during a term of years of certain sums to be expended under the direction of the Children's Bureau of the Department of Labor in cooperation with certain State agencies for the purpose of reducing the mortality of women and children in con-

nection with birth. The Supreme Court, in separate actions brought by the State of Massachusetts and by a Federal taxpayer of that State, refused to declare the Maternity Act unconstitutional (*Massachusetts* v. *Mellon,* 262 U. S. 447; *Frothingham* v. *Mellon,* 262 U. S. 447).

3. *Appropriations to finance banks and fiscal operations.*—Although the Constitution grants no express power to Congress to create banks, this authority was implied by Chief Justice Marshall from the fiscal powers granted to Congress (*McCulloch* v. *Maryland,* 4 Wheat. 316). Although Congress has no express power to establish financial institutions to lend money on farm mortgages, such authority was implied from the power to borrow, where institutions set up were empowered to act as fiscal agents and as depositaries of public moneys, even though such powers had not been used and it was obvious that it was not the primary intention of Congress that the institutions should be utilized for such purposes (*Smith* v. *Kansas City Title and Trust Co.,* 255 U. S. 180). The case just cited involved the constitutionality of the Federal Farm Loan Act (39 Stat. 360). Mr. Charles E. Hughes, now Chief Justice Hughes, appeared for the Federal Land Bank of Wichita, Kansas. He based his case for the validity of the Act on the following propositions:

> I. Congress has power to use the public money and to provide for the borrowing of

money, to aid in agricultural development throughout the country in accordance with the systematic and general plan to promote the cultivation of the soil, involving the application of money through loans or otherwise, and that Congress, having this power, could exercise it by the adoption of appropriate means to that end and the creation of instrumentalities for that purpose.

II. Congress has the power to judge for itself what fiscal agencies the Government needs and that its decision of that question is not open to judicial review; that Congress may create in its discretion, as it has created in this instance, moneyed institutions equipped to serve as fiscal agents of the Government and to provide a market, as stated in the Act, for United States bonds.

Mr. Justice Day, speaking for the court, said (p. 208):

> Since the decision of the great cases of *McCulloch* v. *Maryland,* 4 Wheat. 316, and *Osborn* v. *Bank,* 9 Wheat. 738, it is no longer an open question that Congress can establish banks for national purposes * * *. While the express power to create a bank or incorporate one is not found in the Constitution, the court, speaking by Chief Justice Marshall, found authority so to do in the broad general powers conferred by the Constitution upon the Congress to lay and collect taxes, to borrow money, to regulate commerce, to pay the public debts, to declare and conduct war, to raise and support

> armies, to provide and maintain a navy, etc. * * * In *First National Bank* v. *Union Trust Co.,* 244 U. S. 416, 419, the Chief Justice, speaking for the court, after reviewing *McCulloch* v. *Maryland* and *Osborn* v. *Bank,* and considering the power given to Congress to pass laws to make the specific powers granted effectual, said: "In them it was pointed out that this broad authority was not stereotyped as of any particular time, but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet any situation which it was deemed required to be provided for."

Title II of the Recovery Act establishing P. W. A. may be related to the same powers as support Congress in establishing farm loan and other banks for national purposes. P. W. A. is in certain aspects also a fiscal institution of the Government, lending and granting national moneys to finance the construction of public works throughout the nation. It buys and sells bonds of States and of their subdivisions (Section 203). The bonds purchased, if retained, support the credit of the United States, and if sold their proceeds become available for further fiscal operations.

4. *Reclamation Acts.*—The Reclamation Acts, beginning in 1902, authorize advances of Federal

funds without interest to irrigation districts established by State law. (See 32 Stat. 388.) Many of these acts provide for the generation and sale of electric power by the districts. (See 34 Stat. 117.) These acts have been sustained under the power of Congress to dispose of property belonging to the United States, *U. S.* v. *Hanson,* 167 Fed. 881; *Burley* v. *U. S.,* 179 Fed. 1.

Arizona v. *California,* 283 U. S. 423, sustained the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057), whereby the United States became a party to a contract with seven States and Congress appropriated $165,000,000 to finance the construction of Boulder Dam, including hydroelectric works, authorized the sale of electric current to reimburse the Government, and required operation by the United States. The act was challenged on the ground that it was not an exercise of any power delegated to Congress. While the act was not attacked specifically on the ground that the United States was without power to generate and sell electrical energy in connection with a project improving navigation and providing flood control, the plaintiff's attack was broad enough to include that challenge. The bill was ordered dismissed. The provisions of the act requiring reimbursement through the sale of electrical energy were essential to the legislation and in dismissing the bill the court sustained the constitutionality of the exercise of the power

of the United States to generate and sell electricity under the circumstances stated. The court points out, page 456, that:

> The fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred even if those other purposes would not alone have justified exercise of Congressional power.

Citing *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548; *Kaukauna Water Power Co.* v. *Green Bay etc. Co.,* 142 U. S. 254, 275; *In re Kollock,* 165 U. S. 526, 536; *Weber* v. *Freed,* 239 U. S. 325, 329; *U. S.* v. *Doremus,* 249 U. S. 86, 93. So here the fact that the establishment of the plant of the defendant City may accomplish a reduction of rates cannot invalidate the authority of the Executive, pursuant to an Act of Congress, to purchase bonds, although the National Government has no jurisdiction to legislate on the rates of a municipal enterprise.

Appropriations to finance the Red Cross.—The power of Congress to appropriate and dispose of money and national property for purposes promotive of what it deems the general welfare further appears by its Joint Resolutions and Acts with regard to the Red Cross. Large sums and property of great value have been so appropriated and disposed of in times of peace as well as during a state of war. For example: Joint Resolutions of March 7, 1932, 72d Congress, 1st Session (Chap. 72, U. S.

Stat. at Large, Vol. 47, Part 1, p. 61) authorizing the distribution of Government-owned wheat through the American National Red Cross and other organizations for relief of distress; the resolution of July 5, 1932 (Stat. at Large, Vol. 47, Part 1, p. 605), authorizing the distribution of Government owned wheat and cotton to the American National Red Cross and other organizations for the relief of distress; joint resolution of July 22, 1932, making appropriations to enable the Federal Farm Board to distribute Government owned wheat and cotton to the American National Red Cross, etc. (appropriations of $40,000,000, Stat. at Large, Vol. 47, p. 741) and the act of February 8, 1933 (Stat. at Large, Vol. 47, Part 1, p. 797), authorizing the distribution of Government owned cotton to the Red Cross.

Further instances of the exercise of the power discussion are: the appropriation in 1838 for the collection of agricultural statistics and other agricultural purposes; in 1852 for the purchase and distribution of seeds; in 1850 there was an appropriation for the chemical analysis of vegetable substances. In 1862 the Department of Agriculture was established and in the following year $80,000 was appropriated to it for the study of plant and animal diseases and insect pests, culture of tobacco, silk and cotton, irrigation, the adulteration of foods and the like.

The loan and grant challenged is in aid of a public use so declared by the State. Practically all the

States authorize municipal competition with private corporations in the field at least of water and electricity. In *Green* v. *Frazier* (Governor of North Dakota) 253 U. S. 233, the court sustained the acts of North Dakota placing the State in the business of manufacturing and marketing farm products, providing homes for the people and creating a state banking system. The court said, p. 240:

> Questions of policy are not submitted to judicial determination and the courts have no general authority of supervision over the exercises of discretion which under our system is reposed in the people or other department of government.

The court further said:

> What was or was not a public use was a question concerning which local authority, legislative and judicial, had a special means of securing information to enable them to form a judgment, and particularly that the judgment of the highest court of the State declaring a given use to be public in its nature would be accepted by this court unless clearly unfounded (p. 242).

What is or is not a public use is thus a matter for State determination. If the use is public the taxing power of the State or cities may be utilized to accomplish it, whether or not the use challenged places public bodies in competition with private enterprises is immaterial.

In many of the instances specified the power has been exercised although the effect of the appropriation might be to injure existing enterprises. Appropriations in aid of free State education doubtless affected injuriously private educational institutions for profit. The free distribution of seeds and much of the work of the Department of Agriculture infringed upon the market of private enterprise. Distribution through the Red Cross of wheat, etc., trespassed upon the market of corporations engaged in the sale of grain.

Education is not a subject-matter which the Constitution authorizes Congress to regulate. However, since the Act admitting Ohio to the Union (1802), Congress has made extensive appropriations of lands and of money to the States and to subdivisions of the States. The constitutionality of these appropriations seems never to have been questioned, but, on the other hand, has been, by implication, repeatedly assumed, for the provisions of the statutes have been interpreted and applied by the Supreme Court in a very large number of cases (*Campbell* v. *Doe* (1851), 13 Howard 204; *Haire* v. *Rice* (1907), 204 U. S. 291; *California* v. *Desert, etc., Co.* (1917), 243 U. S. 415).

In *Wyoming* v. *Irvine* (1907), 206 U. S. 278, the Morrill Act (July 2, 1862, 12 Stat. 503), the first nation-wide appropriation of land to the purposes of education was interpreted by the Supreme Court without any suggestion that its constitutionality was questionable.

The power challenged here rests upon Article I, section 8, clause 1, clause 18, upon the aggregate of the powers conferred in section 8 and upon Article IV, clause 3, section 2, by which Congress has power to dispose of the property of the United States. That property includes money is not disputable.

Story, in his work on the Constitution, Vol. 2, secs. 907–988, advances the same views as to the powers of the Congress to appropriate money for the general welfare of the United States as were entertained by Hamilton, Monroe, and Jackson. In section 909 he says:

> An attempt has been sometimes made to treat this clause as distinct and independent and yet as having no real significancy per se, but (if it may be so said) as a mere prelude to the succeeding enumerated powers. It is not improbable that this mode of explanation has been suggested by the fact that, in the revised draft of the Constitution in the convention, the clause was separated from the preceding exactly in the same manner as every succeeding clause was, viz, by a semicolon and a break in the paragraph; and that it now stands, in some copies, and it is said that it stands in the official copy, with a semicolon interposed. But this circumstance will be found of very little weight, when the origin of the clause and its progress to its present state are traced in the proceedings of the convention. It will then appear that

> it was first introduced as an appendage to the power to lay taxes. But there is a fundamental objection to the interpretation thus attempted to be maintained, which is, that it robs the clause of all efficacy and meaning. No person has the right to assume that any part of the Constitution is useless or is without a meaning; and a fortiori no person has a right to rob any part of a meaning, natural and appropriate to the language in the connection in which it stands. Now, the words have such a natural and appropriate meaning, as a qualification of the preceding clause to lay taxes. When, then, should such a meaning be rejected?

Again, at section 914, in discussing the clause under consideration, he says:

> It is, on its face, a distinct, substantive and independent power. Who, then, is at liberty to say, that it is to be limited by other clauses, rather than they to be enlarged by it; since there is no avowed connection, or reference from the one to the others? Interpretation would here desert its proper office, that which requires that every part of the expression ought, if possible, to be allowed some meaning, and be made to conspire to some common end.

In discussing the contention at that time advanced by some, that the grant to lay taxes and make appropriations for the general welfare was limited to the specific objects enumerated in section 8 of Article I, he says, in section 916:

Stripped of the ingenious texture by which this argument is disguised, it is neither more nor less than an attempt to obliterate from the Constitution the whole clause, "to pay the debts and provide for the common defense and general welfare of the United States", as senseless or inexpressive of any intention whatsoever. Strike them out, and the Constitution is exactly what the argument contends for. It is, therefore, an argument that the words ought not to be in the Constitution; because if they are, and have any meaning, they enlarge it beyond the scope of certain other enumerated powers, and this is both mischievous and dangerous. Being in the Constitution, they are deemed to be *vox et preterea nihil,* an empty sound and vain phraseology, a fingerboard pointing to other powers but having no use whatsoever, since these powers are sufficiently apparent without. Now, it is too much to say that in a constitution of government, framed and adopted by the people, it is not a most unjustifiable latitude of interpretation to deny effect to any clause, if it is sensible, in the language in which it is expressed, and in the place in which it stands. If words are inserted, we are bound to presume that they have some definite object and intent, and to reason them out of the Constitution upon arguments ab inconvenienti (which to one mind may appear wholly unfounded and to another wholly satisfactory) is to make a new Constitution, not to construe the old one. It is to do the very

> thing, which is so often complained of, to make a Constitution to suit our own notions and wishes, and not to administer or construe that which the people have given to the country.

Again, at section 919, he says:

> A power to lay taxes for any purposes whatsoever is a general power; a power to lay taxes for certain specified powers is a limited power. A power to lay taxes for the common defense and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them. If the defense proposed by a tax be not the common defense of theUnited States, if the welfare be not general, but special or local, as contradistinguished from national, it is not within the scope of the Constitution.

Mr. Pomeroy, in his work on Constitutional Law, third edition, sections 274 and 275, in discussing the power conferred upon the Congress by the paragraph under consideration, said:

> 274. The subsection should, therefore, be understood as though it read, "taxes may be laid and collected in order to pay debts and provide for the common defense and general welfare." Thus, the Congress does not possess an absolutely unlimited power of taxation. It cannot resort to this high attribute for one or more of three purposes, payment of debts, the common defense, the

general welfare. The defense must be common and the welfare general. But, after all, this leaves a sufficiently wide field for legislative operations. Money may be raised to pay any debts, however contracted, whether now existing or to become due at a future time. Common defense and general welfare are terms of the broadest generality, and within them can be easily included all the objects for which governments may legitimately provide.

275. What measures, what expenditures will promote the common defense or the general welfare, Congress can alone decide, and its decision is final. It is certainly not necessary that any particular expenditure should be spread over the whole country, to bring it within the meaning of a defense which shall be common, or a welfare which shall be general. All the disbursements of the government must be met by revenue of some kind, and must finally be paid by some species of taxation, except that small portion which may be provided for by the sale of public property. Congress expends vast sums of money in the erection and adornment of a capitol, in furnishing a library, in the purchase of pictures, statues, and busts, in endowing a scientific institution; but it is not claimed that these disbursements are not made for the general welfare. A fort in New York is for the common, not local, defense. In short, the legislature is not trammeled by

> these provisions; it has ample scope and verge in which to indulge its proclivities to raise and expend money.

If any additional authority were needed on the right of the Congress to appropriate money for the general welfare of the United States, it may be found in the unbroken and continuous practice of the Congress since the very beginning of our government. Hundreds of acts have been passed by the Congress appropriating money for which no other authority can be found than that granted by the general welfare clause of the Constitution, and, so far as we are advised, none of these acts has ever been held unconstitutional by the Supreme Court. Mr. Justice Story, in his work on Constitutional Law, vol. 2, 3d edition, 1833, section 988, in discussing the interpretation which had been placed upon the general welfare clause of the Constitution by the Congress, says:

> In regard to the practice of the government, it has been entirely in conformity to the principles here laid down. Appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad, or their narrow sense, and in an especial manner appropriations have been made to aid internal improvements of various sorts in our roads, our navigations, our streams, and other objects of a national character and importance. In some cases, not silently, but

upon discussion, Congress has gone the length of making appropriations to aid destitute foreigners and cities laboring under severe calamities; as in the relief of the St. Domingo refugees in 1794, and the citizens of Venezuela who suffered from an earthquake in 1812. An illustration equally forcible of a domestic character, is the bounty given in the cod fisheries, which was strenuously resisted on constitutional grounds in 1792; but which still maintains its place in the statute book of the United States.

Cooley, in his work on Constitutional Limitations, 7th edition, page 102, in discussing the force to be given to contemporaneous and practical construction of constitutional provisions, says:

> But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially where this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. And where this has been given by officers in the discharge of their official duty, and rights have

> accrued in reliance upon it, which would be divested by a decision that the construction was erroneous, the argument ab inconvenienti is sometimes allowed to have great weight.

More than once the Supreme Court has recognized the soundness of the rule laid down by Judge Cooley. In the case of *Stuart* v. *Laird,* 1 Cranch. 299, the Court sustained the right of its members to sit as circuit judges on the ground of practical constitution. The Court said:

> Another reason for reversal is, that the judges of the Supreme Court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible character. This practical exposition is too strong and obstinate to be shaken or controlled.

In the case of *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 351, the Court in holding that the appellate jurisdiction of the Supreme Court extends to a final judgment or decree in any suit in the highest court of a State in the cases enumerated in the 25th section of the Judiciary Act gave as one

of the reasons for its conclusions the practical construction which had been given both to the Constitution and the Judiciary Act. The Court said:

> Strong as this conclusion stands upon the general language of the Constitution, it may derive support from other sources. It is an historical fact that this exposition of the Constitution, extending its appellate power to State courts, was previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings both in and out of the State conventions. It is an historical fact that at the time when the judiciary act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact that the Supreme Court of United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States of the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence

> of enlightened state courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremedial doubts.

In the case of *Cohens* v. *Virginia,* 6 Wheat. 264, 418, the Supreme Court by Chief Justice Marshall, in a case involving the same question as that involved in *Martin* v. *Hunter's Lessee,* placed great stress upon practical and contemporaneous construction.

In the case of *Bank of United States* v. *Halstead,* 10 Wheat. 51, the Court was called upon to decide whether the laws of the United States authorizing the courts of the Union to so alter the form of process of execution used in the Supreme Courts of the States in September 1789, as to subject to execution lands and other property not so subject by the state laws in force at that time, were constitutional. The Court held that these laws were constitutional, and gave as one of the reasons for so holding the practical construction which had been given to them by the courts. The Court said:

> And if any doubt existed whether the act of 1792 vests such power in the courts, or with respect to its constitutionality, the practical construction heretofore given to it ought to have great weight in determin-

> ing both questions. It is understood that it has been the general, if not the universal, practice of the courts in the United States so to alter their executions as to authorize a levy upon whatever property is made subject to the like process from the state courts; and under such alteration many sales of land have no doubt been made which might be disturbed if a contrary construction construction should be adopted.

In the case of *Ogden* v. *Saunders,* 12 Wheat. 290, Mr. Justice Johnson, in discussing the weight which should be given a contemporaneous exposition of the Constitution, said:

> Every candid mind will admit that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption that the cotemporaries of the Constitution have claims to our deference on the question of right because they have the best opportunities of informing themselves of the understanding of the framers of the Constitution and of the sense put upon it by the people when it was adopted by them.

In the case of *McCulloch* v. *Maryland,* 4 Wheat. 316, Chief Justice Marshall, in discussing the weight which should be given to the practical construction of the Constitution by the courts, said:

> The first question made in the cause is, has Congress power to incorporate a bank? It has been truly said that this can scarcely be considered as an open question, entirely

> unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation. It will not be denied that a bold and daring usurpation might be resisted after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the Constitution deliberately established by legislative acts on the faith of which an immense property has been advanced ought not to be lightly disregarded.

In the case of *Field* v. *Clark,* 143 U. S. 649, Mr. Justice Harlan, in discussing the weight to be given by courts to practical construction of constitutional provisions, said:

> The practical construction of the Constitution as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be over-

> ruled unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land.

The power to dispose of property belonging to the United States is vested in Congress without limitation. In *United States* v. *Gratiot,* 14 Peters, 526, 537, 538, the Court said:

> The term territory as here used (the territory or other property belonging to the United States) is merely descriptive of one kind of property and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation. * * * The disposal must be left to the discretion of Congress.

In *Gibson* v. *Chouteau,* 13 Wall. 92, 99, the Court said as to the power of disposition of the public domain:

> That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made.

The term "property" as the Court pointed out in *Dred Scott* v. *Sandford,* 19 How. 393, 436 (see also *Mormon Church* v. *United States,* 136 U. S. 1, 64), includes personal property. Later decisions show that it includes money from whatever source

derived. *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S. 438, 443; *Bush* v. *Elliott,* 202 U. S. 477, 481.

The grant of power to appropriate which is contained in the general welfare provision is in no wise restricted to the subject matters upon which Congress may make regulations.

Congress would have had ample authority to make the appropriation and to give the directions for their expenditure contained in Secs. 202, 203 even if it had not been given by Article IV general authority to dispose of the resources of the Government, but had been given only the authority contained in Article I, section 8 to collect taxes to pay the debts and to provide for the general welfare and common defense of the United States.

This clause does not empower Congress to provide for the general welfare otherwise than through appropriations, for the entire clause relates to taxation and to the use of the funds raised by taxation.

However, the clause does not restrict appropriations to the subject matters upon which Congress may legislate. As to such subject matters it would have been unnecessary to specifically authorize appropriations, for the final clause in this section empowers Congress—"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Even without the general welfare provision, Congress could, whenever it has authority to impose its will by positive commands, appropriate the money

necessary to make its will effective. The clause authorizing Congress by appropriations to provide for the general welfare must therefore have a broader purpose than merely to facilitate the exercise of the powers of Congress to impose commands.

Moreover, the grant of power to tax and appropriate in the first clause of section 8 is distinct from the grants of power in each of the other sixteen clauses of that section, and there is nothing in the sweeping term "to provide for * * * the general welfare" to show that the power to appropriate money was given merely in aid of the grants in those other clauses.

As pointed out in Story on the Constitution, 5th edition, sec. 913:

> It is not said, to "provide for the common defense and general welfare, in manner following, viz", which would be the natural expression to indicate such an intention. But it (the clause) stands entirely disconnected from every subsequent clause, both in sense and punctuation, and is no more a part of them than they are of the power to lay taxes.

Story further says, sec. 991:

> In regard to the practice of the government, it has been entirely in conformity to the principles here laid down. Appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad or their narrow sense.

In secs. 923, 924, he says:

> But then, it is said, if Congress may lay taxes for the common defense and general welfare, the money may be appropriated for those purposes, although not within the scope of any other enumerated powers. Certainly, it may be so appropriated; for if Congress is authorized to lay taxes for such purposes, it would be strange if, when raised, the money could not be applied to them. That would be to give a power for a certain end, and then deny the end intended by the power. * * *
>
> If there are no other cases which concern the common defense and general welfare, except those within the scope of the other enumerated powers, the discussion is merely nominal and frivolous. If there are such cases, who is at liberty to say that, being for the common defense and general welfare, the Constitution did not intend to embrace them?

Hare, American Constitutional Law, 245, 246, says concerning President Monroe's message (Richardson Messages and Papers of the Presidents, Vol. 2, pp. 142, 144, 166 et seq.):

> This recantation was * * * a virtual adoption of the Hamiltonian theory that the power of Congress over the Treasury is in effect absolute, and extends to the appropriation of money for any object which in their judgment will conduce to the defense of the country or promote its wel-

> fare. * * * Such in fact has been the practice since the Government went into operation; and the right can hardly be disputed in the face of a usage which will soon extend through an entire century. In the greater number of the instances above referred to, the Government did not act in its sovereign capacity, but like a rich and public-spirited individual who draws his purse strings for the common good.

Willoughby on the Constitution, sec. 269, declares:

> The doctrine has become an established one that Congress may appropriate money in aid of matters which the Federal Government is not constitutionally able to administer and regulate.

Burdick on the Constitution, sec. 77, takes a similar position.

The constitution of any nation is practically what is has become of the practical construction of those in authority, acquiesced in by the people (Note by Cooley to Story on the Constitution, sec. 311). *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 472, 473, and cases cited. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 352. *McCulloch* v. *Maryland,* 4 Wheat. 316, 401. *Field* v. *Clark,* 143 U. S. 649, 691. *Downes* v. *Bidwell,* 182 U. S. 244, 286. *Ogden* v. *Saunders,* 12 Wheat. 212, 290.

One of the first acts of the First Congress was to grant bounties on exports of salted and dried fish

(Act of July 4, 1789, 1 Stat. 27). Later bounties were provided by the Act of August 10, 1790 (1 Stat. 182). The Act of February 16, 1792, provided a bounty on the cod fisheries (2 Stat. 229). Another bounty was allowed by the Act of July 29, 1813 (3 Stat. 49). Bounties to fishermen: Acts of June 26, 1834, (6 Stat. 569), June 30, 1834 (6 Stat. 578).

Congress has repeatedly appropriated money to aid sufferers from calamities in foreign countries (2 Stat. 730; 3 Stat. 561; 9 Stat. 207; 16 Stat. 597; 21 Stat. 303; 38 Stat. 238; 38 Stat. 776; 42 Stat. 351, $20,000,000 for grain for Russia).

By the Act of June 15, 1860 (12 Stat. 117), Congress made an appropriation to observe an eclipse of the sun. It has given large sums for expositions at London (Act of June 1, 1872, 17 Stat. 203), at Philadelphia (Act of February 16, 1876, 19 Stat. 3), Paris (Act of May 10, 1888, 25 Stat. 621), Chicago (Act of August 5, 1892, 27 Stat. 389), St. Louis (Act of March 3, 1901, 31 Stat. 1444), Jamestown (Act of March 5, 1905, 33 Stat. 1047), San Francisco (Act of June 23, 1913, 38 Stat. 77), Rio de Janeiro (Act of November 2, 1921, 42 Stat. 210), and Pilgrims Tercentenary (Act of May 13, 1920, 41 Stat. 598).

It would seem that if Congress may constitutionally provide for the diverse purposes exhibited in many hundreds of instances, for education, agricultural benefits, fisheries, encouragement of manu-

factures, health of mothers, the relief of destitution here and abroad, it may also provide means to enlarge opportunities of employment in a crisis arising from the partial cessation of industry whereby at least 10,000,000 workers usually employed are without means of maintaining themselves or their families and of making the purchases necessary for the functioning of the economic system.

The foregoing examples of exercise of the power of Congress to appropriate money and property for purposes it deems promotive of the national well-being relate to social enterprises not for profit conducted by public authority. Instances of Federal aid to enterprises for profit are legion. No express provision in the Constitution authorizes Congress to impose duties on imported goods other than for revenue. Many tariff acts, particularly of late years, disregarded revenue and provide protection in aid of private industry. Public lands equal in area to the smaller European States have been granted to railroads. This may possibly be in connection with the power to establish post offices and post roads and certainly with the power to dispose of the property of the United States (Article III, Section 4). Loans to corporations engaged in marine transportation have been frequent in late years, and steamship companies operating throughout the globe have been heavily subsidized through contracts for carrying the mails. Perhaps such subsidies may be connected with the power to

establish post offices, but the power of Congress to dispose of property of the United States by making loans and grants to cities is certainly as well established as its power to apply Federal funds to subsidize foreign commerce. Regulation of commerce is authorized, but subsidizing foreign commerce might be said to be somewhat remote from the power specifically granted. The National Government has also subsidized corporations engaged in air transportation and to the competitive disadvantage of transportation by land. The entrance by the United States into the business of transportation by the Parcel Post Act impinged upon that of the express companies, but here it is fairly clear that the power exercised is expressly granted. It is cited to show that the National Government has not hesitated to embark upon enterprises competitive with private enterprises. Furthermore, the encouragement of useful public works may be related to the power of Congress to provide for the common defense. The enlargement of the generating capacity of electrical energy certainly promotes the national defense. It is recognized by the leaders of the electrical industry that generating capacity, particularly since the depression, has not kept pace with the necessities of the country (Electrical World, Vol. 104, No. 9, p. 21, 1934). Under conditions of modern warfare metallurgy, the fabrication of steel, aluminum, and other metals by electrical energy is indispensable for successful war-

fare. The project challenged adds to generating capacity, and also provides a future market for the current generated by Grand Coulee and will aid ultimately in amortizing the cost thereof.

In Title II of the National Industrial Recovery Act, Congress found and declared that the preparation of a "comprehensive program of public works" is a national purpose and promotive of the general welfare. It was the apparent purpose and policy of Congress to abandon the haphazard and unrelated construction of Federal public works through the nation, and by the inducement of loans and grants to states and their subdivisions to bring Federal and non-Federal public works into interrelation. It further appears from Section 202 of the Recovery Act that it was the purpose of Congress to arrest the impairment of the national home of the people of the United States through the destruction of forests, the pollution of rivers, the erosion of lands and otherwise, by means of appropriations in aid of projects having the effect of improving and protecting natural resources. That natural resources, particularly rivers, forests, and lands, have been injured by lack of regional or centralized control is undeniable. Neither water nor electric energy have any respect for State boundaries. Congress therefore authorized the inclusion in the comprehensive program not only of Federal public works but of municipal improvements with a view to bringing them in such relation with each

other as to prevent interference by one project with others and to promote an orderly and intelligent construction of public works and development of natural resources within the continental United States and even the outlying possessions.

In modern life electrical energy is almost as necessary as water. Congress, knowing that the laws of the several States authorize municipalities to construct and operate electric systems, directed the inclusion of projects for the construction, repair, and improvement of such systems in the comprehensive program and their financing by loans and grant, all with a view to empowering the President to bring facilities for producing and providing the people with electrical energy into the comprehensive national program.

In the entire history of the nation not a single Act of Congress appropriating money to provide for the general welfare or for purposes found by Congress to be national has been held unconstitutional by the Supreme Court. There are, indeed, few instances in which the power of Congress in this regard has even been challenged. In *U. S.* v. *Gettysburg Railway Company,* 160 U. S. 668, the question before the Supreme Court was whether the Federal Government had the power to condemn the land on which the Battle of Gettysburg was fought for the purpose of laying out a national park, erecting suitable tablets, preserving the battle site from being defaced by defendant's railroad, marking the positions of the various com-

mands in the battle, etc. The Supreme Court sustained the power of condemnation. The Court said that such power resulted from the power of taxation to be exercised for the common defense and the general welfare, and that the use to which the condemned land was to be put was one so closely connected with the general welfare of the nation as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country.

In *U. S.* v. *Realty Company,* 163 U. S. 427, the power of Congress to appropriate money to pay a bounty to sugar manufacturers producing sugar meeting a certain test was challenged. Congress had passed an appropriation act (28 Stat. 910) appropriating money to pay a bounty of two cents a pound to producers and manufacturers of sugar if the sugar produced or manufactured should meet a certain quality test. The sole authority relied on for this appropriation was the power granted to Congress by the Constitution to levy taxes to provide for the general welfare. In the earlier case of *Field* v. *Clark,* 143 U. S. 649, the Supreme Court had declined to pass on the question whether the Constitution empowered Congress to grant bounties to sugar producers. In *United States* v. *Realty Company* the immediate question before the court was whether the United States, having promised to pay a bounty, even if it had no power to do so, thereby had created a debt which Congress had power to discharge by an appropriation.

The court said:

> It is unnecessary to say here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises.

The court decided that Congress had the power to appropriate money to pay a debt arising only from the moral obligation of the nation "although the debt could obtain no recognition in a court of law." The court said:

> Under the provisions of the Constitution (Article I, Section 8) Congress has power to lay and collect taxes, etc., "to pay the debts" of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object.

By what sort of reasoning can it be argued that the same language which authorizes Congress to appropriate money to pay a debt not incurred in the discharge of a power specifically enumerated in the Constitution does not also authorize Congress to appropriate money to achieve a national purpose essential to the general welfare?

Judge Merrill E. Otis, on November 2, 1934, delivered an opinion of *Missouri Utilities Company* v. *City of California, et al., supra,* in a case which involved the same questions as those presented in this suit, in which he said:

> My conclusion is that the Congress has the power to appropriate money for the promotion of the general welfare and that it is not restricted in so doing to objects germane to its other delegated powers. Congress therefore has the power to appropriate money for the relief of any condition of unemployment which is not merely local but is national in its extent and hence inimical to the general welfare.

The wisdom or expediency of appropriations by Congress to promote the general welfare and accomplish purposes found by Congress to be national is not subject to review by this court.

The Supreme Court of the United States has consistently adhered to the principle that the wisdom or expediency of enactments by Congress is not a proper subject for judicial review.

> The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without entrenching upon the domain of another Department of Government. *Inter-State Commerce Commission* v. *Brixson,* 154 U. S. 447.

In *Northern Securities Co.* v. *United States,* 193 U. S. 197, the Supreme Court stated:

> If the statute is beyond the constitutional power of Congress, the court would err in the performance of a solemn duty if it did not so declare. But if nothing more can be

> said than that Congress erred * * * the remedy for the error and the attendant mischief is the selection of new Senators and Representatives who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

In the case of *Smith* v. *Kansas City Title & Trust Co., Supra,* the Court said:

> It is urged, the attempt to create these Federal agencies, and to make these banks fiscal agents and public depositories of the Government, is but a pretext. But nothing is better settled by the decisions of this Court than that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives. Citing *Veazie Bank* v. *Fenno,* 8 Wall. 533, 541; *McCray* v. *United States,* 195 U. S. 27; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 147, 153, 156.

That Title II of the National Industrial Recovery Act does effectuate the purposes declared national by Congress and the general welfare can be seen from the results. During the last few months in which the program has been in full swing weekly reports on public works projects (including railroad and federal) show that direct employment has averaged 600,000 men. In addition, production of enormous quantities of building materials

necessary to construct the many projects has resulted in indirect employment estimated by statisticians at about 1,200,000 men. Recognizing that the primary function of any sound and economic social life is the satisfying of the basic needs of food, clothing, and shelter, there would seem to be no question that an Act pursuant to which there is placed in the hands of approximately 1,800,000 men theretofore unemployed the means with which to obtain such necessities for themselves and their families through labor promotes the economic recovery and so the public welfare. Furthermore, it cannot be disputed that the construction throughout the United States of permanent useful public improvements in and of itself contributes to the general welfare by making available the conveniences of life through social service heretofore denied many of our people, and by increasing in a large measure the capital assets of the nation.

The United States of America is a national government with sovereign powers

In the Gold Clause Cases (Feb. 18, 1935) Mr. Justice Hughes declared (p. 11):

> The Constitution grants to the Congress power "To coin money, regulate the value thereof, and of foreign coin." Article 1, Sec. 8, par. 5. But the Court in the legal tender cases did not derive from that express grant alone the full authority of the Congress in relation to the currency. The Court found

the source of that authority in all the related powers conferred upon the Congress and appropriate to achieve "the great objects for which the Government was framed"—"a national government, with sovereign powers." *McCulloch* v. *Maryland,* 4 Wheat. 316, 404, 407, 4 L. Ed. 579; *Knox* v. *Lee, supra,* pages 532, 536 of 12 Wall.; *Julliard* v. *Greenman, supra,* page 438 of 110 U. S., 4 S. Ct. 122, 125. The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make all laws which shall be necessary and proper for carrying into execution" the other enumerated powers. *Julliard* v. *Greenman, supra,* pages 439, 440 of 110 U. S., 4 S. Ct. 122, 125.

McCulloch v. *Maryland, supra, U. S.* v. *Gettysburg Railway Company, supra; Smith* v. *Kansas City Title and Trust Company, supra,* declare that the Constitution is a living instrument furnishing a perpetual sanction to the legislative authority, within the limits of a just discretion, to take into consideration the wants and demands of society and to adopt appropriate measures to meet any sit-

uation which threatens the general welfare of the nation. The United States of America is a nation, and Congress has power to meet whatever emergency may arise to threaten its life. By the Recovery Act, Congress declared an emergency. When millions are unemployed the fighting power of the United States is being undermined. Congress has constitutional power to make appropriations to protect the nation not only from armed attack by a foreign enemy but from the destruction of its citizens by reason of the collapse of the economic system. As means to that end it may apply appropriations to finance the employment necessary to restore and preserve the proper functioning of the economic system.

It is not deemed necessary to discuss at length the question whether the welfare clause is a mere limitation on the taxing power. In Chapter IV, Twilight of the Supreme Court, Edward S. Corwin (1934), Professor Corwin says:

> While adoption of the Constitution was pending some of its opponents made the charge that the phrase "to provide for the general welfare" was a sort of legislative joker which was designed, in conjunction with the "necessary and proper" clause, to vest Congress with power to provide for whatever it might choose to regard as the "general welfare" by any means deemed by it to be "necessary and proper." The suggestion was promptly repudiated by advo-

cates of the Constitution (See Storey, Comm., Secs. 907, 908) on the following grounds. In the first place, it was pointed out, the phrase stood between two other phrases, both dealing with the taxing power—an awkward syntax on the assumption under consideration. In the second place, the phrase was coordinate with the phrase "to pay the debts", that is, a purpose of money expenditure only. Finally, it was asserted, the suggested reading, by endowing Congress with practically complete legislative power, rendered the succeeding enumeration of more specific power superfluous, thereby reducing "the Constitution to a single phrase."

In the total this argument sounds impressive, but on closer examination it becomes less so, especially today. For one thing, it is a fact that in certain early printings of the Constitution the "common defense and general welfare" clause appears separately paragraphed, while in others it is set off from the "lay and collect" clause by a semicolon and not, as modern usage would require, by the less awesome comma. * * *

Then as to the third argument—while once deemed an extremely weighty one—it cannot be so regarded in light of the decision in 1926 in the case of *Myers* v. *United States*. * * * the Court held on that occasion that the opening clause of Article II of the Constitution which says that "the executive power shall be vested in a President of the

> United States", is not a simple designation of office but a grant of power, which the succeeding clauses of the same article either qualify or to which they lend "appropriate emphasis" (272 U. S. 118, 128). Granting the soundness of this position, however, why should not the more specific clauses of Article I be regarded as standing in a like relation to the "general welfare" clause thereof? * * *
>
> Assuming, nevertheless, that it is only by *spending* that the national legislative power may constitutionally provide for "the general welfare", the question still remains, what is that "general welfare" which Congress may thus promote? * * *

After discussing the Hamiltonian and Madisonian constructions and the practice of Congress in effect adopting the former and citing instances (in addition to those heretofore cited in this brief), to wit: the purchase of a library by the National Government, of paintings, of services of a chaplain, donations to the wretched sufferers of Venezuela, the dispatch of the Lewis and Clark Expedition to the Pacific, the learned author concludes that Congress "may continue to appropriate the national funds without judicial let or hindrance" (p. 176).

It seems that the power of Congress to determine what is a national purpose may not be reviewed by the courts. At least the Supreme Court has never exercised its power to review such declarations by Congress. The *Gettysburg* case, the *Sugar Bounty*

case, the *Farm Loan Bank* case, the *Boulder Canyon Project Act* case strongly indicate that if the court has such power it is loath to exercise it. It is declared in the *Frothingham* case and elsewhere that the judiciary *per se* has no duty to require Congress or the Executive to adhere to the Constitution. It is only where it appears that rights are involved which the court has power to enforce that it will consider the question, and then only where the plaintiff shows that the act challenged will cause him direct injury. It is, indeed, difficult to imagine a case where the mere expenditure of Federal money will cause direct injury to anyone. It may cause loss as in the case of Government aid to a competitive enterprise, either public or private, through aiding such enterprise to avail itself of an existing market. Our economic life is based upon competition. Federal aid to an enterprise having a right to compete in the market does not constitute the invasion of any legal right. For these reasons it is deemed unnecessary to reply further to the contention of the appellee that the grant in aid of the Coeur d'Alene project is not for what the appellee concedes a public purpose. The courts have long ago denied the contention that the taxing power might not be exercised to finance municipal enterprises for the sale of water and electric power. In *Jones* v. *City of Portland* (*Me.*), 245 U. S. 217, the court held an act of the State of Maine authorizing cities to establish fuel yards for the purpose

of selling fuel to their inhabitants did not deprive taxpayers of due process of law within the meaning of the Fourteenth Amendment. The court said that what was or was not a public use was a local question. The Supreme Court of Idaho has long ago decided that the establishment of municipal waterworks and electric facilities by cities was a "public use."

In *Arizona* v. *California,* 283 U. S. 423, Arizona urged that the declaration of Congress in the Boulder Canyon Project Act, that the purpose of the act was to improve the navigation of the Colorado River, was a mere subterfuge and false pretense (p. 455). The court said:

> Into the motives which induced members of Congress to enact the Boulder Canyon Project Act this court may not inquire. (Citing *McCray* v. *U. S.,* 195 U. S. 27, 53–59; *Weber* v. *Freed,* 239 U. S. 325, 329–330; *Wilson* v. *New,* 243 U. S. 332, 358–359; *U. S.* v. *Doremus,* 249 U. S. 86, 93–94; *Dakota, etc., Co.* v. *South Dakota,* 250 U. S. 163, 187; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 161; *Smith* v. *Kansas City, etc., Co.,* 255 U. S. 180, 210.) The act declares that the authority to construct the dam and reservoir is conferred, among other things, for the "purpose of improving navigation and regulating the flow of the river." As the river is navigable and the means which the act provides are not unrelated to the control of navigation (*U. S.* v. *River Rouge*

Improvement Co., 269 U. S. 411, 419), the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary is not for this court to determine. Compare *Fong Yue Ting* v. *U. S.,* 149 U. S. 698, 712–714; *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, 340; *U. S.* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 65, 72–73; *Everards Breweries* v. *Day,* 265 U. S. 545, 559.

Appellee further contends that public funds may not be expended to promote a "public purpose when there is no public necessity as where the need has already been provided for by private enterprise." Whether or not there is public necessity and whether the need has been adequately provided for is a question for local authority. Federal officers may adopt their finding. In enacting and appropriating funds for the accomplishment of Title II of the Recovery Act, Congress intended to accomplish certain national purposes—the provision of employment, the increase of purchasing power, the regeneration of the industrial system by the quickening effect of Federal expenditures, veterans' preference, etc. That there was need for the provision of employment the fact of more than ten million unemployed workers usually employed is ample evidence. That there was need for Federal expenditure of Federal funds to regenerate construction and through it pro tanto the economic

system of the country is amply attested by the decline in the expenditures of the building industry, which was at least 80% of 1929 standard idle in June 1933. That many veterans were without jobs also clearly appears. It was because private enterprise was unable to provide employment that the National Government made provision for it.

Congress omitted in the Recovery Act to require that the facilities to be financed through that Act should be only those which did not compete with private enterprise. Many public works of the categories authorized to be included in the comprehensive program (Section 202) and financed (Section 203) are competitive—waterworks, markets, tunnels, bridges, river and harbor improvements by reason of competition with railroads, low-cost housing with existing housing, public hospitals with private hospitals, drydocks with existing drydocks. If the Administrator had adopted such a rule as that contended for by the Appellee he would have departed from the plain intention of Congress. The Act invests the Administrator, at the direction of the President, with the discretion to finance or not to finance projects according to their judgment of comparative social desirability. Accordingly the Administrator has adopted the policy complained of by the appellee of preferring such municipal electric enterprises as will produce economies to cities over purchased power or provide electric rates lower than those provided

by existing utilities if at such lower charges or rates the enterprises are self-liquidating. This test of desirability is within the discretion conferred. As the Act authorized the financing of such municipal enterprises and as the funds available were insufficient to finance all enterprises applying for aid, it has been necessary to apply a reasonable test.

The appellee complains that for the Administrator to finance or not to finance municipal enterprises competing with utility companies according to such test is invasion by the National Government of the powers of the States and of the State of Idaho in this case. But the purchase of bonds and the making of a grant in aid of an enterprise does not affect the power of the State to regulate rates of utility companies. The State of Idaho does not regulate municipal electric rates.

Appellee argues further that the promotion or stimulation of private industry is not a public purpose. (Counsel defines the City's project as private.) It intends as a corollary of this, that Congress may not appropriate national funds to promote or stimulate private industry. Such a statement betrays an astounding ignorance of the National Government since its institution. The Tariff Acts have stimulated private industry, ship subsidies, grants of empires in lands to railroads. The Government financed the two banks of the United States. Aid to private enterprise has become commonplace. Neither the Constitution of

the United States nor any decision of the Supreme Court inhibits the National Government from disposing of its money or property as it sees fit. There have been innumerable occasions of the appropriation of national funds to private individuals as gratuities. But it has long been established that municipal waterworks and power systems are public, not private.

The discretion of the President and of the Administrator conferred by title II, sections 202, 203, is not subject to review by the courts

The bill contains allegations attempting to show that the agreement by the Administrator to aid the City in financing its project is an abuse of administrative discretion. It argues that the purposes of Title II of the Recovery Act will not be served by such aid and that it will in effect destroy more employment than it will afford.

Nothing is better settled than that the courts may not review the exercise of administrative discretion reposed in officers of the Government by acts of Congress in the absence of palpable abuse. Congress has authorized the President and the Administrator to determine what projects shall be included in the comprehensive program and, if so included, how they shall be financed. These officers have included the project challenged in the comprehensive program and have determined the manner in which financial aid will be extended. The allegations of the bill do not amount to a statement of palpable abuse of discretion.

While the direct employment on the project may be small, the purchase of the necessary materials will provide employment. The funds applied to the project will have a regenerative effect towards industrial recovery. While this project alone may not further substantially the purpose of the Recovery Act, it is an item of a great nation-wide aggregate made up of many such items.

Houston v. *St. Louis Independent Packing Company,* 249 U. S. 479, 329, S. Ct. 332, 63 L. Ed. 717; *City of New Orleans* v. *Payne,* 147 U. S. 261, 13 S. Ct. 303, 37 L. Ed. 162; *Interstate Commerce Com.* v. *Chicago & Alton Ry. Company,* 215 U. S. 479, 30 S. Ct. 163, 54 L. Ed. 291; *Johnson* v. *Drew,* 171 U. S. 93, 18 Sup. Ct. 800, 43 L. Ed. 88; ***Decatur*** **v.** *Paulding,* 14 Pet. 497, 10 L. Ed. 599; *Burfenning* v. *Chicago St. P. M. & O. Ry. Company,* 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; *Smith* v. *Hitchcock,* 226 U. S. 53, 33 S. Ct. 6, 57 L. Ed. 119; *Ark. Wholesale Grocer's Assn.* v. *Fed. Trade Comm.* (C. C. A., 8th) 18 F. (2d) 866.

The fact that the administration of the Act affects matters not directly subject to the control of Congress such as reduction of rates by private companies through municipal competition cannot affect the validity of the Act if its broad purpose lies within the powers of Congress. *U. S.* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 72, 73; *Alabama Power Co.* v. *Gulf Power Co.,* 283 Fed. 606, 613; *Waters* v. *Philips,* 284 Fed. 237; *Alabama* v. *U. S.,* 38 Fed. (2d) 897; *Green Bay Canal Co.* v. *Patton Paper Co.,*

172 U. S. 58; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *Northern Securities Co.* v. *U. S.,* 193 U. S. 197; *Smith* v. *Kansas Title & Trust Co.,* 255 U. S. 180. In the Gold Clause Cases, Mr. Justice Hughes said:

> We have not attempted to summarize all the provisions of these measures. We are not concerned with their wisdom. The question before the court is one of power, not of policy.

In *Missouri Utilities Company* v. *City of California, et al.,* Judge Otis concluded his opinion with respect to the validity of the acts of the Administrator alleged in that case to be an abuse of discretion with the following statement:

> If Congress has exercised its power unwisely, if the executive officers of the government have exercised the power conferred on them unwisely, if through lack of wisdom and of foresight they are doing damage to the republic and its people far outweighing the good they are accomplishing, those are unfortunate possibilities in every government. The Constitution of the United States, which is strong enough to provide for any emergency, provides also a sure remedy against the incompetence of men in office. It makes their terms in office relatively short.

Delegation of legislative power

The plaintiff challenges the legality of the loan and grant agreement on the ground that insofar as Title II, Section 203, empowers the President or

the Administrator to select projects for financing, it is an unconstitutional delegation of legislative power. Plaintiff's counsel rest this point in large measure upon *Panama Refining Company et al.* v. *Ryan et al.,* Supreme Court, October term, January 7, 1935, which declares Section 9, subsection (c), of Title I of the National Industrial Recovery Act an unconstitutional delegation of power to the President. That subsection authorized him to prohibit the transmission in interstate and foreign commerce of petroleum in excess of the amounts permitted to be produced or withdrawn from storage by State legislation. Violations of such orders as the President might make in the premises were authorized to be penalized by fine and imprisonment. The orders of the President authorized by this section were necessarily regulations under penalty of conduct of a large group of persons engaged in the production and sale of oil. The constitutional power of the Congress to delegate to the President discretion to select projects to be aided by Federal financing is in a category far removed from the power to prescribe rules of conduct. A loan and grant to a municipality to finance its project is not a regulation of conduct. No city is required to accept such loan or grant. No duty is imposed upon them by the act of Congress or by the President's action thereunder with penalty or otherwise. Their conduct is not regulated, they voluntarily agree to the conditions attached to the

loan which have the effect of promoting the purposes declared by Congress, primarily the provision of nation-wide employment. The conditions prescribed by the loan and grant agreement are conditions attached to the disposition of property of the United States and they are analogous to the conditions required in connection with the sale or lease of public lands. The relations between the borrower and the Government are not in the nature of rules of conduct which are imposed by the authority of Congress to legislate but are contractual obligations. If, in the oil clause, Congress had empowered the President to make contracts with the producers of oil whereby they would agree not to make shipments in contravention of State laws, the question of delegation would be analogous to that presented to this court.

Title I of the Recovery Act is legislation in the sense of rules of conduct, the violation of which is penalized by fine and imprisonment. Title II constitutes directions to the Executive as to the spending of the appropriations authorized. The loan and grant agreements authorized by Title II to be made on such terms as the President shall prescribe are voluntary agreements. They are not laws or orders affecting private rights.

On page 22 of the court's decision in the oil case it is said:

> We are not dealing with action which, appropriately belonging to the executive prov-

> ince, is not the subject of judicial review, or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority depends on determination of fact, those determinations must be shown. * * * When the President is invested with legislative authority, as the delegate of Congress, in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation.

The President has not been invested by Title II with legislative authority but with power to expend appropriations and to execute contracts providing the terms of loans and grants to public bodies authorized by the laws of the States to enter into such contracts. To show the distinction between action appropriately belonging to the executive province and orders and rules amounting to legislation the court (Note 15) cited a number of cases. *United States* v. *Chemical Foundation,* 272 U. S. 1, determines the validity of the provision of the Trading with the Enemy Act empowering the President to seize and sell the property of enemy aliens. The court says,

page 12, that this delegation was within the established exceptions as to the delegation of power such as are expressed in *Field* v. *Clark,* 143 U. S. 649, 692; *Buttfield* v. *Stranahan,* 192 U. S. 470, 496; *Union Bridge Company* v. *United States,* 204 U. S. 364, 377; *United States* v. *Grimaud,* 220 U. S. 506, 516.

While the real lawmaking power (rules of conduct with penalties) of Congress may not be delegated, discretionary authority may be granted to executive or administrative authorities to determine in specific cases when and how the powers legislatively conferred are to be exercised and to establish administrative rules and regulations fixing in detail the manner in which the requirements of the statutes are to be met and the rights therein created to be enjoyed. A leading case is *Field* v. *Clark, supra.* Section 3 of the Tariff Act of October 1, 1890, provided that:

> Whenever and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States, he may deem to be reciprocally unequal and unreasonable, he shall have the power, and it shall be his duty to

> suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just.

It was argued to the court that the statute vested in the President an unconstitutional discretionary power to determine when certain taxes should and when they should not be levied and collected. The Supreme Court upheld the grant of power, saying with reference to Section 3 of the statute:

> It does not in any real sense, invest the President with the power of legislation * * * Congress itself prescribed in advance, the duties to be levied, collected, and paid on sugar, molasses, coffee, tea, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President.

Buttfield v. *Stranahan,* 192 U. S. 470, involved an act of Congress authorizing the Secretary of Treasury to establish standards, upon recommendation of a board of experts, by which should be determined the purity, quality, and fitness for consumption of teas sought to be exported into the United States, and to exclude from importation such teas as would not satisfy these requirements. In upholding the constitutionality of this act, the Supreme Court stated:

> We are of opinion that the statute, when properly construed * * *, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute.

J. W. Hampton, Jr., & Co., 276 U. S. 394, involved the constitutionality of Section 315 of the Tariff Act of September 21, 1922, which delegated power to the President of the United States to change rates under flexible tariff provisions. Mr. Chief Justice Taft, in delivering the opinion of the Court which upheld the constitutionality of the Tariff Act, stated:

> The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.

The Chief Justice cited with approval Judge Ranney of the Ohio Supreme Court in *Cincinnati,*

Wilmington, and Zanesville Railroad Co. v. *Commissioners,* 1 Ohio St. 77, 88:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Other cases in which the Supreme Court has upheld the delegation of power to exercise discretion in the carrying out of a congressional act are: *St. Louis, Iron Mt. & So. Ry.* v. *Taylor,* 210 U. S. 281 (Interstate Commerce Commission authorized to designate standard height and maximum variations of drawbars for freight cars); *United States* v. *Grimaud,* 220 U. S. 506 (Secretary of Agriculture given power to prescribe regulations for use of national forest reservations); *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194 (Interstate Commerce Commission authorized to require carriers to keep accounts in specified manner). Additional cases are collected in 51 Mich. L. Rev. 986 (1933).

By Title II of the Recovery Act and by the appropriation acts financing it Congress committed to the Executive the duty of expenditure in the manner prescribed by Sections 202 and 203. The expenditure of appropriations is an executive function. Congress as a legislative body pre-

scribes categories of projects which the Executive may finance with a view to providing employment quickly (Section 202). The selection of projects within those categories is an administrative matter and is not legislative. The standards set by Congress to guide the administration of the act are: (1) consistency with a nation-wide program of public works and which would have the effect of developing national resources and useful public services, thus adding to the capital assets of the nation; (2) quick increase of employment on a nation-wide scale. The only feasible method by which a public-works program of the nature and scope which Congress desired to effectuate could be carried out was by conferring broad discretion upon the President, through the Administrator and through such other agencies as he might deem necessary, to carry into effect the purposes and policies set forth by Congress.

In *Gallardo, Treasurer,* v. *Puerto Rico, etc., Light & Power Co.,* C. C. A., 1st Circuit, 18 Fed. (2d) 918, the court determined that the Puerto Rico Water Power Act laying out a scheme for the development, providing means for it, and giving adequate general directions was not invalid as a delegation of legislative powers to the Commissioner of the Interior (p. 922).

From a review of the cases in which the Supreme Court has reviewed acts of Congress delegating power to the Executive it is clear that the court

is concerned that due process of law affecting private rights should be provided. Penalties sought to be enforced under administrative orders or such orders affecting private property are required to be based on findings supported by adequate evidence. But the court has never assumed to review delegations to the Executive to expend appropriations. No private plaintiff can raise the question. A justiciable controversy is not presented.

CONCLUSION AND SUMMARY

The loan and grant agreement expresses the understanding between the Government and the City of Coeur d'Alene. Its legality is challenged as *ultra vires* of the Government, but *ultra vires* or not its performance invades no right of the appellee. The appellee has no right to be free of private or governmental lending or grants or gifts to its municipal competitor. The appellee's prospective loss is a mere *damnum* and that *damnum* does not flow from the loan or grant but from the exercise of a right given the defendant city by the laws of Idaho. The prospective competition by the City is not "illegal competition." The only illegality claimed (so far as the Government is concerned) is that the loan and grant is *ultra vires* of the Government's powers. But the appellee is not in a position to challenge such alleged *ultra vires* action. It fails to show that it will suffer direct injury. Furthermore the action is not in fact *ultra vires*. Congress has power to declare purposes national and to pro-

mote them by appropriations although such purposes may not be subject matters which the Constitution authorizes it to *regulate*. The Supreme Court deems the question whether the purposes declared national are so in fact non justiciable. It has been the practice of the National Government since its institution to declare certain purposes national and to effectuate them by appropriations. The expenditure of national funds to provide employment by financing a nation-wide construction of public works is in accord with this long established practice. A practice so long continued and exercised without judicial interference constitutes an established construction of the Constitution.

Title II, Sections 202 and 203, N. I. R. A., is not legislation in the sense of a command under penalties applicable to the people or to any group thereof, but directions to the Executive prescribing the method of expending an appropriation. The limitations on the delegation of legislative power are inapplicable. In any event the Act prescribes standards to guide its administration, and these standards are sufficiently definite to satisfy the rules as to delegation of legislative power. Courts will presume that Congressional legislation is constitutional unless the contrary is clearly shown. *United States* v. *Delaware and Hudson Company*, 213 U. S. 366; *United States* v. *Coombs*, 12 Peters 72; *Concordia Fire Insurance Company*

v. *State of Illinois,* 292 U. S. 539; *Whitney* v. *State of California,* 274 U. S. 357.

Accordingly it is urged that this court reverse the order of the District Court granting an injunction *pendente lite* and denying the motion to dismiss and order this suit dismissed.

Respectfully submitted.

HENRY T. HUNT,
Special Assistant to the Attorney General as Attorney for Harold L. Ickes as Federal Emergency Administrator of Public Works.

U. S. GOVERNMENT PRINTING OFFICE: 1935

No. 7773

In the United States Circuit Court of Appeals for the Ninth Circuit

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN AND C. C. HODGE, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

Upon Appeal from the United States District Court for the District of Idaho, Northern Division

BRIEF OF APPELLEE

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v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

BRIEF OF APPELLEE

STATEMENT OF CASE.

This is an appeal from an order granting an injunction *pendente lite,* restraining the defendants from proceeding with the construction of a municipal electric generating plant and distribution system and the financing thereof with Federal Emergency Administration of Public Works funds (Trans. R., p. 190).

ALLEGATIONS OF THE COMPLAINT.

Description of Plaintiff's Property

The appellee, a Washington corporation, authorized to do business in Idaho, is the owner of a hydro-electric power plant situated in the Spokane River at Post Falls, Idaho, about ten miles distant from Coeur d'Alene, and the owner of several hydro-electric plants situated on the same river in the State of Washington. The power plants are connected by transmission lines for the purpose of affording continuity of service to its customers in Northern Idaho and Eastern Washington. It furnishes electric power for practically all consumers in the northern counties of Idaho, and has ample power capacity and facilities to serve all uses now existing or reasonably to be anticipated for many years. Its plants, transmission lines and facilities were designed and constructed to render electrical service to the above territory, and it has been authorized either by gen-

eral laws or by authority of the Public Utilities Commission of the State of Idaho to construct, own, operate and maintain the same. Its properties and facilities are modern and efficient and it renders a completely adequate and efficient electric utility service. It owns distribution systems in various cities and villages of Northern Idaho and serves the inhabitants thereof and the territory adjacent thereto (Par. V.; R., pp. 10 to 13).

Appellee holds a franchise, granted to its predecessors, to furnish the City of Coeur d'Alene with electricity for lighting and other purposes for a period of fifty years from October 19, 1903, under which it and its predecessor have rendered such services for more than thirty years.

In 1930, appellee purchased the electric power and light system of the City of Coeur d'Alene and has since owned, maintained and operated it. Since acquiring the same, it has expended more than $33,000 in improving and reconstructing the system and $27,000 in the installation of new transformers, providing continuity of service through two independent connections.

The rates charged for electric services are subject to regulation and control by the Public Utilities Commission of the State.

In 1922, the rates for electric service in Coeur d'Alene were fixed by the Public Utilities Commis-

sion after a valuation and rate hearing. The rates remained the same until the appellee, with the approval of the Public Utilities Commission put into effect reductions in four different rate schedules aggregating $11,400 annually.

Coeur d'Alene had a population in 1930 of 8,297. Appellee furnishes electric services to all classes of customers who number 2,377, and, in addition, to approximately 332 additional customers residing in territory adjacent to the city, and supplies all electric light and power sold and distributed in the city. Its investment in the distribution system, exclusive of generating and transmission equipment, is more than $200,000.

It is a taxpayer of the United States, of the State of Idaho, of the County of Kootenai, of the City of Coeur d'Alene, and of other taxing districts.

Taxes in Idaho paid by the appellee for the year 1933 upon its generating, transmission and distribution systems amounted to more than $214,000, of which there was paid to the County of Kootenai for state, county and municipal taxes within the county the sum of $66,547.94, and in addition thereto, appellee paid to irrigation districts adjacent and tributary to Coeur d'Alene the sum of $10,855.74 in lieu of taxes it would otherwise be required to pay to the state and its subdivisions—a total of $77,403.68. (The sum paid to the irrigation districts represents taxes upon property of appellee used for gen-

erating and delivering electric power to the extent such property is used for furnishing power for pumping water for irrigation or drainage purposes in Kootenai County. The exemption accrues under the laws of Idaho to the benefit of consumers of power for such purposes and is fixed by the State Board of Equalization.)

The total gross revenue received from customers in Kootenai County for the year 1933, including the City of Coeur d'Alene, amounted to the sum of $148,333.16 more than one-half of its total gross revenue in the county being paid in said taxes. In addition thereto, appellee paid to the State of Idaho on account of power generation in said county a considerable sum of money under what is known as the Kilowatt Hour Tax.

All of appellee's property in Coeur d'Alene is subject to state, county, city, school and other municipal taxes. (Par. VI.; R., pp. 13 to 16.)

Acts of Defendants to Construct Competing System

The city council of the City of Coeur d'Alene in November, 1933, enacted two ordinances, one (No. 713, Ex. A, R., p. 77) calling an election for the purpose of submitting to the voters of the city a proposition for incurring an indebtedness of $300,000 by the issuance of general obligation bonds to pay the costs and expenses of the acquisition by purchase or by construction of a light and power plant and distribution system for the city. At the

same time an ordinance was passed providing for the incurring of a similar indebtedness of $300,000 for the acquisition by purchase or construction of a water system. December 12, 1933, at an election provided for in said ordinances, both propositions were approved by more than two-thirds of the voters. (Reference is made to the ordinance for the acquisition of the water system for the reason that one application was made to the Federal Emergency Administration of Public Works for funds for the two systems (Par. VIII.)

Pursuant to action by the city council on December 14, 1933, the city filed with the Federal Emergency Administration of Public Works an application for funds amounting to the sum of $650,000, and a net loan of $475,000, which in the application is alleged to exclude a 30% grant or gift for the cost of labor and materials to be used in the construction of said two systems.

In the application it appeared that an engineer employed by the city council had made a report and prepared plans for the construction of the said two systems. It appeared that the total cost of the power plant and electric distribution system was estimated at $337,580, which is in excess of the amount of indebtedness authorized to be incurred for that purpose.

Of the sum of $337.580. the total cost of labor and materials was estimated at $276.512.91. contractors' profit $27.578.09 and other costs and expenses $33,480. The amount estimated by said engineer to be expended directly for labor in Coeur d'Alene in the construction of the generating plant and the distribution system amounted only to the total sum of $29.672.75. plus labor on the building to house both the Diesel power plant and the pumping plant for the water system. estimated at $6.900.00. (P. 19.)

Both the report of the engineer and the application to the Public Works Administration set forth that the cost of the complete electric power and light system would be in excess of the sum authorized to be expended by Ordinance No. 713. (Par. IX.; R., p. 19.)

Appellee filed a protest with the State Advisory Board of the Federal Emergency Administration of Public Works against the approval of the application and the granting of said funds (Par. X.; R., p. 19).

The Administrator of Public Works at Washington approved the application of the defendant and proposes to advance funds to the city in the amount of $337,580 for the construction of the electric system. including the so-called grant of 30% above referred to.

Appellee charges that the defendant city and its officers propose to enter into a contract with the Federal Emergency Administration of Public Works by the terms of which it will undertake and agree to construct said Diesel engine electric power plant and power distribution system, costing at least $337,580.

Allegations Respecting Idaho Constitution

Paragraph XI of the bill charges that the action of the defendants constitutes the incurring of an indebtedness and creation of a liability exceeding the annual income and revenue of the city without the assent of two-thirds of the qualified voters voting at an election held for the purpose and without provision being made for an annual tax sufficient to pay the interest and provide a sinking fund for the payment of the principal thereof as provided in Section 3 of Article VIII of the Idaho Constitution.

The bill charges that the voters in the city were deceived by certain concealments of facts and by false and erroneous statements prepared under the direction of and given publicity by the city and its officers. The particulars wherein they were deceived are set forth in full in paragraph XIII of the complaint.

The principal and most glaring of these is the charge that the city led the voters to believe that the distribution system would provide service throughout the city and that the report of the engi-

neer as published and given publicity apparently so stated. Whereas, in fact, two sections of the city were omitted from the distribution system; that the concealment of the intention not to supply the said two sections of the city was made for the purpose of deceiving the citizens residing therein and inducing them to vote for said bonds, and that the voters in said sections were deceived into so voting.

It is further charged that the engineer employed by the city prior to the alleged bond elections made a report which was published and which influenced the voters and which was untrue with respect to other material matters. That the report and the advertisements and publicity put out by the city and its officers represented that the rates would not be higher, whereas, the report of the engineer actually shows that even if the city secured 80% of the business "which is assumed by the engineer", it would require an average rate of at least 3.43c per kilowatt hour, exclusive of the power used for pumping water, whereas, appellee now furnishes said service at an average of only 3.33c per kilowatt hour in Coeur d'Alene, exclusive of power used for pumping water.

Allegations of Injury to Plaintiff

The injury which appellee will suffer is set forth in paragraph XVI. If the municipal power plant is constructed, appellee will either be compelled to enter into competition and suffer substantial loss in

its operations in the city, or abandon entirely its properties and system in the city. If the system should be abandoned, employees now working would necessarily be discharged and a number of other employees engaged in the maintenance of transmission lines and other services would be reduced.

The business of appellee consists in serving various and divers users in large towns, smaller villages and communities, in rural districts, electric service to farms, pumping water for irrigation and industrial services. Each class of business lends substantial aid to appellee's ability to carry on the others and each class is incapable of withdrawal without substantial impairment of its ability to serve the others.

The bill particularly calls attention to the fact that appellee is now serving a large number of users of electric light and power at their homes and places of business on small tracts adjacent to the City of Coeur d'Alene; that it will be compelled to continue such service to these users as a public service corporation, and yet it can only do so at great loss and inconvenience and probably a substantial increase in rates to said users, whereas the defendant city has no authority to engage in the sale of electricity outside the limits of the city, except that the municipality has the right to sell surplus power, but appellee is advised that it has no power to engage in generating surplus electricity in the city for distribution and sale outside.

That the injury to appellee, its stockholders, bondholders and employees is irreparable. (Pars. XVI and XVII; R., pp. 30-31.)

Cost of Plant in Excess of Amount Authorized

The complaint charges that the application of the defendant to the Federal Emergency Administration of Public Works is based upon an engineering report, plans and specifications prepared by an engineer; that a distribution system of the type proposed in said report to supply 80% of the customers of said city, together with a Diesel plant of three units, would exceed in cost the sum of $400,000, and an adequate Diesel generating plant and distribution system for the entire city would cost more than $450,000. These facts are fully set out in paragraph XVIII.

In paragraph XX, the bill charges that it is the purpose of the defendants to construct a plant primarily calculated to serve the business section and the more populous sections of the city and that with the funds provided it will be unable to extend service throughout the city, leaving to appellee the sparsely populated sections wherein the business is unprofitable and where the appellee, if it continued to do business in the city, would be unable to serve at reasonable rates without loss; that the city does not pretend that it will undertake to serve the various irrigation and farming areas in the vicinity of Coeur d'Alene and the loss of business to appel-

lee would seriously impair its ability to continue to serve said users.

Employment

Paragraph XXI shows that under the proposed ordinance, the total amount to be paid out for labor in the construction of the electric power and distribution system amounts to a sum but slightly in excess of $29,000, exclusive of labor estimated for the power house and pumping plant at $6,900. (p. 19.)

The bill charges that in the engineering report it is estimated that the labor cost of operation will include five men and one clerk, and for the water system three men should be allowed and for clerical help and supplies $2,000 for both systems.

Actually at the present time, appellee has employed in the electric light and water service 24 employees. Therefore, instead of giving added employment, the plan of the defendants is to reduce employment. The labor required under the city's proposal in the construction of this plant is inconsequential.

Tenth Amendment

On September 27, 1934, a release of the Federal Emergency Administration of Public Works set forth in paragraph XXII, declared the purposes, policy and practices adopted with respect to appli-

cations of municipalities for loans and grants to finance municipal systems. In the release it is stated:

> "Municipal or local publicly-owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes. * * *
>
> "However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation." (R., pp. 38-40.)

The release further showed that it was the purpose of the Administrator to control electric rates and to make the loans for that purpose primarily.

The bill charges that the loan and grant for which application had been made by the city could not have been approved "with a view to increasing employment quickly" for the release stated that the purpose of the Administrator was to make elec-

tricity more broadly available at cheaper rates. The undisputed and admitted facts in this case show that Mr. Ickes was applying this policy and practice to the application of the City of Coeur d'Alene, and that his action was guided purely and solely with respect to rates and not with any view to increasing employment quickly or at all. One of the policies announced in the release was that the Public Administrator would make it a practice before approving any municipal loan to give the utility company an opportunity to put into effect rates at least as low as those at which the municipal system would be self-liquidating, had not been given effect with respect to the City of Coeur d'Alene because the city did not contemplate at the time of its application rates lower than those charged by appellee (R., pp. 41-42).

The bill further charged that the city could not construct a Diesel engine electric generating plant and distribution system for the city as proposed in its application and reduce rates below the rates now charged by the appellee and make the same self-liquidating. *For the purpose of this hearing, this allegation is admitted.*

On November 7, 1934, Mr. Post, President of appellee, sent a telegram to the Public Works Administrator which is set forth in the bill. He called attention to the fact that it had been publicly stated that the Public Administrator had approved the

application of the City of Coeur d'Alene. The telegram further stated:

> "Feel sure this application has not been called to your attention because its approval would violate statement of principles contained in Public Works Administration press release number nine eighty-nine dated September twenty-seventh nineteen thirty-four stop Our present rates in Coeur d'Alene are among the lowest in the United States and regulated by Idaho Public Utilities Commission stop Application of the City of Coeur d'Alene for loan and grant which we had an opportunity to answer does not contain any schedule of rates which city proposes to put in force if PWA shall loan and give it money with which to build a system to operate in competition with our company therein stop We have never seen any schedule of rates proposed by the city and it is impossible for the city to make this proposed project self-liquidating under schedules of rates lower than ours stop Construction of Diesel engine plant in Coeur d'Alene at this time would seem to violate all the principles contained in your press release and in other releases of the PWA not only because of the situation outlined above but also because there is at the present time in this territory a large surplus of hydro-generated electrical energy which will be greatly augmented by the Government through the Grande Coulee development stop Feel sure you have no intention to depart from previously announced policies and that Coeur d'Alene application will not be granted." (R., pp. 43-44.)

Mr. Ickes replied by a telegram (R., pp. 44-45) to the effect that the city's proposed electric rates

contemplated a 20% reduction; that if the Washington Water Power Company placed in effect rate reductions equal or greater than that of the city, the Power Board of Review would consider the matter further.

In reply, Mr. Post sent a telegram to Mr. Ickes which is set forth in the bill at pages 45-53 of the record. In substance it stated that it had not been asserted prior to the application that the city intended to reduce the rates; that at a meeting of city officials of Coeur d'Alene with the Public Utilities Commission of Idaho and representatives of appellee, the city officials had stated to the Commission that they were not interested in any reduction in electric rates, but only in municipal ownership. Further that the original papers asking for the loan or grant contained no offer or proposal of a rate reduction and that no paper had been filed or furnished the appellee by the city proposing any such reduction and that if any such had been filed, the appellee should be furnished with a copy thereof. The telegram further called attention to the fact that over 18% of the gross receipts from electric service in the State of Idaho was paid back in taxes; that the proposed municipal plant did not cover the city, but deliberately omitted a portion thereof within the city limits, and also a portion outside the city limits where the Washington Water Power Company had over 300 customers; that the proposed plant could not be built with the amount of money

asked for and to extend it to cover the entire territory would materially increase the shortage.

Attention was called to the fact that the rates of appellee are among the lowest in the United States; that a valuation and rate hearing is in preparation by the Commissions of Washington and Idaho in which it is expected the two Commissions will act together and determine, not only the property valuation, but the reasonableness of all rate schedules in each state; that the appellee's rates are controlled by said Commissions.

In reply thereto, Mr. Post received a telegram from Mr. H. T. Hunt, Chairman of the Electric Power Board Review for the Administrator, stating that Mr. Ickes would consider the points and advise the city officials of his conclusions.

On November 20, 1934, appellee commenced this action. On the same day the City of Coeur d'Alene received from the Federal Emergency Administration of Public Works a proposed contract for execution by the city.

Thereafter and on November 23rd an ordinance was passed and adopted by the city council and approved by the mayor and on the same day published approving the loan and grant agreement between the City of Coeur d'Alene and the United States and authorizing its execution and delivery,

further authorizing the mayor and city clerk to consent to modifications or changes therein and to execute further agreements found desirable.

The agreement referred to provided for a loan and grant not exceeding $650,000 for the financing of a water system and Diesel generating plant and electric distribution system. A copy of the ordinance is attached to the complaint as Exhibit C (R., pp. 87-90) and a copy of the agreement is attached as Exhibit D (R., pp. 91-119). (In passing, it may be noted that this ordinance was passed and the contract signed after notice had been served upon the city of a motion and order to show cause as to why an injunction should not be issued, and before the hearing.)

On November 21st, and prior to the passage of said ordinance and the execution of said agreement, the mayor of Coeur d'Alene received a telegram from the Public Works Administration stating that a rate ordinance would be required as a condition of the loan which would fix rates approximately 20% below existing rates and that an air-mail letter would follow. The air-mail letter was received November 24th and is set forth in the bill of complaint (R., pp. 55-56). It states that a rate ordinance should be passed, stating that the rates referred to in the telegram would be made available by the municipal plant and will not be increased unless and until it is proved to the satisfaction of the Adminis-

trator that the rates are insufficient to provide for operating expenses etc., and further that the ordinance should recite that the agreement of the city to maintain such rates and charges as aforesaid is in further consideration of the grant from the Government and is for the benefit of the electric consumers and taxpayers of the city.

A rate ordinance has not been passed, the defendants being enjoined by the court from further proceeding, but the contract expressly provided:

> "23. *Conditions Precedent to the Government's Obligations.* The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:
>
> * * * * * * * *
>
> (i) Unless and until the Borrower shall adopt a rate and bond ordinance, satisfactory to the Administrator, in form, sufficiency and substance." (R., p. 104.)

The bill alleges that the statements contained in the telegrams sent by Mr. Post were accurate and true. That the approval of the application of the City of Coeur d'Alene and the making of said loan or grant and gift is not made for the purpose of relieving unemployment and the relief of unemployment will not be accomplished to any extent or at all thereby, but that the sole and only purpose or purposes thereof are unlawful and in violation of the National Industrial Recovery Act and in violation of the Tenth Amendment, of the Fifth Amend-

ment, and of the first section of the Fourteenth Amendment to the Constitution of the United States, such purpose or purposes being:

(1) The destruction of the property of the plaintiff because of its failure or refusal to accede to the demand of the Federal Emergency Administration of Public Works to usurp the exclusive power and function of the State of Idaho to fix and regulate rates, charges and service of the plaintiff as a public service corporation engaged in intrastate business in that state and to substitute coercion by an agency of the Federal Government as to such rates, charges and services in place of the lawful and orderly regulation thereof by the state regulatory body which has full, complete and ample authority in relation thereto.

(2) To foster and encourage public ownership and political operation of electric light and power systems whether they may or may not be engaged in interstate commerce.

(3) To usurp and/or override the police powers of the State of Idaho in the following additional respect, to-wit, the State of Idaho has exclusive power to provide the method of regulation of rates charged by municipally-owned public utilities and the attempt of the Public Works Administrator in said contract to fix or regulate the rates to be charged by the City of Coeur d'Alene, or to control the modification thereof in the future is violative of the Tenth Amendment to the Federal Constitution.

ERRONEOUS STATEMENT OF FACTS IN BRIEF OF APPELLANT ICKES

In the brief of counsel for appellant Ickes, the loan and grant agreement is referred to at pages 10 to 14. On page 11 it is said that the loan and grant agreement expresses the entire intention of the Administrator and the city with respect to the purchase of the bonds. It is said on page 13 that no other action than that expressed in the agreement is contemplated by the Administrator, although reference is made to his letter of November 21st, 1934, to the mayor of Coeur d'Alene, setting forth provisions which he required in the rate ordinance.

Counsel then makes (perhaps because the matter was prepared by some subordinate) a totally untrue statement. It is said that the date of the loan and grant agreement is not shown, but that the certificate attached thereto is dated December 17, 1934. (There is no certificate attached thereto.) It is said that it was executed by the city later. That is not true. If it had been so executed later, it would have been after the decision of the court granting the injunction order and in violation of definite understanding at the time of the hearing upon the order to show cause that no act would be done by any of the defendants toward consummating the enterprise or executing any documents pending the action of the court on the application for an injunction. The fact is that the contract was executed by the city on the 23rd of November, 1934, after the service and

prior to the hearing upon the order to show cause. The defendant city officials gathered together on November 23rd and hastily passed the ordinance approving the loan and grant agreement (Ex. C., R., p. 90), and then executed the contract (Ex. D) prior to the hearing before Judge Cavanah on the 24th day of November.

Said brief further states that the condition as to the rate ordinance set out in the letter of November 21st is not contained in the contract, and "it appears, therefore, that the Administrator has waived the requirements expressed in that letter."

The contract referred to expressly provides that the city shall pass a rate and bond ordinance satisfactory to the Administrator (R., p. 104) and in the letter of the Administrator referred to (R., pp. 55-56) it is said "It will be necessary that the ordinance be approved by the Administrator. This can be done either before or after its adoption." This rate ordinance is not the one which was adopted authorizing the execution of the loan and grant agreement, but is the ordinance referred to in the loan and grant agreement, which was to be thereafter passed, containing rate and other provisions satisfactory to the Administrator. No doubt the counsel who appears for the government, when this is called to his attention, will correct the unquestioned inaccuracies contained in the brief. The enactment of a subsequent rate ordinance, of course, is enjoined.

QUESTIONS PRESENTED BY THE BILL

I. *Non-Federal Questions*

The amended bill charges that the actions and proceedings taken in pursuance of the city's plan and the threatened actions which the defendants were about to take under said plan were invalid and unlawful for the following reasons:

(1) Because it is provided by Section 3, Article VIII of the Constitution of Idaho:

> "No county, city, town, township, board of education, or school district, or other subdivision of the state shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: PROVIDED, That this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

That the plan and scheme of the defendants provide for the creation of an indebtedness or liability in excess of $300,000 within the meaning and restriction of said provision of the Idaho Constitution.

(2) Because of the concealment from the voters that two substantial sections of the city would not be included within the area to be served by the proposed municipal light and power system constituted such a fraud against the voters and such a concealment as to vitiate the bond election and render the bonds illegal and void.

(3) Because the misleading and false statements, advertisements and information put out by the city and its officials deceived the voters and vitiated the election authorizing the issuance of bonds.

(4) That Ordinance No. 723 Exhibit "C" attached to the bill of complaint and the proposed loan and grant agreement Exhibit "D" provide for one project, to-wit: a project for financing the construction of a water system, including sinking wells, together with the electric light system under which the defendant city and its officials propose to borrow or receive from the United States in the aggregate $650,000.00 and that ordinance and agreement are violative of the Ordinance No. 713 Exhibit "A" calling for an election for the purpose of submitting the proposal of incurring an indebtedness of $300,000.00 for the purchase or construction of a light and power plant and distribution system.

II. *Federal Questions Involved*

(1) **GENERAL WELFARE CLAUSE.** Under the Constitution of the United States, Congress has no

power to make a loan or gift or grant of public moneys of the United States, to the City of Coeur d'Alene to enable the city to construct and operate a municipal electric plant for the generation and distribution of electricity, the purpose thereof not being one for which Federal taxes may be levied and the receipts appropriated or expended in the exercise of the general taxing power of the United States as defined in Article I, Section 8 of the Constitution for the following reasons:

(a) Article I, Section 8, Clause 1 of the Constitution does not authorize Congress to levy taxes or appropriate moneys for objects not within the enumerated powers, expressly delegated to the Federal Government.

(b) That even if Article I, Section 8, Clause 1 of the Constitution authorizes Congress to levy taxes or appropriate moneys for objects not in furtherance of the enumerated powers, the proposed loan and grant to the City of Coeur d'Alene is not for any public use or purpose affecting the general welfare of the United States, it is not a national or general, but a local enterprise.

(c) The project does not constitute a public use within the general welfare of the United States because the project will be of no direct benefit to any persons who do not reside within the City of Coeur d'Alene and will indeed be of no benefit to them because they are already supplied with electricity at reasonable rates prescribed by law.

(2) **COMMERCE CLAUSE.** The construction of the proposed electric plant in Coeur d'Alene is purely an intrastate matter and cannot be justified under the Commerce Clause of the Federal Constitution, Article I, Section 8, Clause 3 and the National Industrial Recovery Act, Title II, Sections 202-203, if construed as authorizing same under the Commerce Clause, is unconstitutional.

(3) **TENTH AMENDMENT.** Said project and threatened disbursement of the public funds of the United States in furtherance thereof are further illegal and in violation of the Tenth Amendment to the Constitution of the United States because:

(a) The Federal Public Works Administrator has announced and put into operation and effect as a rule of administration a policy whereby he undertakes to grant loans and to make gifts to municipalities for municipal electric plant construction, unless the privately-owned utility then operating in said municipality will agree to fix rates which are satisfactory to said Public Works Administrator, thereby invading and interfering with the reserved power of the states, in this case the State of Idaho, and particularly in its police power to control public utilities and regulate the rates and service thereof;

(b) No such power was delegated to the Administrator by act of Congress and any attempted delegation thereof would be beyond the power of Congress;

(c) The matter of regulating the rates for service and the quality, character and extent of utility service are reserved to the respective states and the power of control thereof cannot be surrendered or delegated. If the announced policy of said Administrator be approved and the acts and transactions complained of by plaintiff be deemed lawful, said Administrator would be able to put into effect according to his uncontrolled and arbitrary determination a policy of granting or withholding the grant of public funds of the United States for use in establishing utility plants in ruinous competition with existing privately-financed plants unless such privately-financed plants comply with his wishes and dictation with reference to their operation and rates.

(4) UNCONSTITUTIONAL DELEGATION OF POWER BY CONGRESS. Title II, Sections 201-202-203 of the National Industrial Recovery Act unconstitutionally delegates legislative power to the President and to the Public Works Administrator under the direction of the President.

(5) PROPOSED PROJECT NOT COVERED BY ACT. Title II, Section 202-203 of the National Industrial Recovery Act does not authorize the Federal Emergency Administration of Public Works to loan, grant or give moneys of the Federal Government for the building of a municipal Diesel engine generating plant or electric distribution system as

proposed by the City of Coeur d'Alene, such project not being within the enumerated works covered or pretended to be covered by the Act.

THE DECISION OF JUDGE CAVANAH

Judge Cavanah in overruling the motion to dismiss and in granting an injunction *pendente lite* held:

That the plaintiff's franchise constituted a property right within the protection of the Constitution of the United States against illegal competition;

That the plaintiff had standing to maintain the bill and challenge the constitutionality of an act of congress as it was in immediate danger of sustaining a direct injury to its property rights as a result of the enforcement of the act;

That the application of the National Industrial Recovery Act to the transaction and plan involved in this case cannot be construed as affecting interstate commerce or justified upon the ground that such power is given to the national government under the commerce clause as claimed by the defendants;

The General Welfare Clause does not authorize the appropriation of mony to make a loan and grant to the City of Coeur d'Alene as proposed by the appellants.

Judge Cavanah rejects appellants' contention that the Constitution leaves to the discretion of Congress to pronounce the objects which concern the general welfare and for which appropriations may be made without any limitation as to the objects being in fact general or national. Judge Cavanah expressly holds that this project is a local and not in any sense a national or general enterprise.

The learned judge clearly indicates that he accepts the Madison view as to the correct interpretation of the General Welfare Clause, but he rests his decision in this case not only on that view, but on the ground that under either the Madison view or the Hamilton view of the General Welfare Clause, the National Industrial Recovery Act, as applied to this project, is unconstitutional.

He rejects the contention of the defendants that although Congress may not regulate subject matters on which the Constitution does not authorize legislation, yet it may promote them by appropriation and prescribe how such appropriation shall be applied. His apt language is as follows:

> "Such construction would seem to contradict itself for if Congress is not authorized to legislate upon a certain subject-matter then it would follow that it may not appropriate money to carry out such unauthorized subject-matter. It certainly would not have power in the first instance to authorize the Administrator to construct the system in the City of Coeur d'Alene

and if so then an attempt to appropriate money for the City to do so would be indirectly exercising a power it did not have. To say that Congress has power to declare certain purposes to be national when as a matter of fact they are not and have no relation to the Nation and are strictly local in a state, would defeat and nullify the express provisions of the Constitution limiting the power of Congress. The fact here is an apt illustration of this assumed authority, where the construction of a diesel engine plant and light system in and to be used solely by the inhabitants of the City of Coeur d'Alene, would not in any way be for a national purpose and to assert under the facts in the bill that its construction would relieve unemployment and that an emergency existed does violence to the English language. The true principle is well settled in *Linder vs. United States,* 268 U. S. 5, as follows: 'Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced.' " (R., pp. 182-3.)

That the acts threatened are violative of the Tenth Amendment respecting which the court says:

"It is not seriously urged that under the facts alleged in the bill, an emergency in fact exists or to relieve unemployment or distress in the City of Coeur d'Alene, calling for the making the loan and grant. The bill discloses just the opposite, and one would gather from

it that the real purpose of making the loan and grant is to bring about the construction of a utility and to regulate the rates for electricity for it clearly indicates that the lowering of rates is the primary purpose and object of the National Government in offering aid to the City as the administrator requires of the City to agree to reduce the rates twenty per cent below those now charged by the plaintiff before the loan and grant will be made, and should the plaintiff reduce its rate to meet the Administrator's approval the loan and grant will be refused. No other reason appears why the loan and grant is being made. Obviously direct control of local utilities operating solely within the State and the regulation of rates is in the State and beyond the power of the National Government." (R., p. 184.)

The court holds that the project is also violative of the limitations contained in Section 8, Art. I of the Constitution of Idaho.

ARGUMENT.

BY REASON OF A DIRECT AND IRREPARABLE INJURY THREATENED BY APPELLANTS' ACTS PURSUANT TO AN UNCONSTITUTIONAL STATUTE, THE APPELLEE WAS ENTITLED TO INVOKE THE JUDICIAL POWER OF THE UNITED STATES.

Appellee takes it as settled that a Federal taxpayer as such has no standing to maintain a suit to enjoin the unconstitutional expenditure of Federal funds.

Massachusetts vs. Mellon-Frothingham vs. Mellon, 262 U. S. 447.

There it was held that a plaintiff suing merely as a taxpayer could not maintain such a suit. Those cases, however, further held that one could invoke the judicial power if he were able to show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the enforcement of such unconstitutional statute and not merely that he suffers in some indefinite way in common with people in general.

Notwithstanding this definite decision, counsel for appellants take the position that appellee can suffer no injury, legal or equitable, resulting from Federal expenditures and that the loan and grant of money by the Public Works Administrator to the City of Coeur d'Alene cannot in any way injure appellee.

The question requires, first, an examination of the rights which the appellee has and which it seeks to protect, and second, whether or not a remedy exists to protect those rights.

Appellee is the owner of an existing valid franchise in the City of Coeur d'Alene which is a property right within the protection of the Constitution of the United States.

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1;

Boise Artesian Hot & Cold Water Co. vs. Boise City, 230 U. S. 84;

Frost vs. Corporation Commission of Oklahoma, 278 U. S. 515;

City of Campbell, Mo. vs. Arkansas-Missouri Power Co., 55 Fed. (2) 560;

Missouri Public Service Co. vs. City of Concordia, 8 Fed. Supp. 1.

It is admitted that appellee has a valid franchise in the City of Coeur d'Alene. It is not an exclusive franchise and it is subject to legal competition, but it is not subject to illegal competition and the company is entitled to be protected against illegal competition.

City of Campbell, Mo. vs. Arkansas-Missouri Power Co., supra;

Missouri Public Service Co. vs. City of Concordia, supra;

Iowa Southern Utilities Co. vs. Cassill (C. C. A.) 69 Fed. (2) 703;

Gallardo vs. Porto Rico Ry. L. & P. Co., 18 Fed. (2) 918-922 (C. C. A.);

Missouri Public Service Co. vs. City of Concordia, supra.

In *Frost vs. Corporation Commission,* supra, it was contended that the appellant has no property right to be affected by the operations of the plain-

tiff and therefore no standing to invoke the provisions of the Fourteenth Amendment or to appeal to a court of equity. Mr. Justice Sutherland says:

> "It follows that the right to operate a gin and to collect tolls therefore, as provided by the Oklahoma statute, is not a mere license, but a franchise, granted by the state in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the 14th Amendment.
>
> * * * * * * * *
>
> "Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the City of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights. (Citing cases.) The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law."

In *City of Campbell, Mo. vs. Arkansas-Missouri Power Co.,* supra, the court said:

> "It is urged that, inasmuch as the plaintiff's franchise was not an exclusive one, it had no right to maintain this suit for injunctional relief. * * * As the owner of this franchise,

> however, the plaintiff was entitled to relief against the illegal acts of others who might assume to exercise the privilege conferred upon it by its franchise. A franchise is property, and, as such, is under the protection of the law, and without express words it is exclusive as against all persons acting without legal sanction. True, plaintiff's franchise was not exclusive in the sense that the city might not grant similar right to another, yet it was exclusive against any one who assumed to exercise the privilege granted the plaintiff, in the absence of authority or in defiance of law. (Citing cases.) We are clear that the plaintiff, as the holder of this franchise to maintain and operate the plant in defendant city, was entitled to protection against all illegal competition."

In the above case, the suit was brought to enjoin the city from carrying out a contract for the purchase of machinery for a municipal light plant, and to restrain the city from operating the same, it being claimed that the action was violative of certain provisions of the Missouri Constitution.

In *Iowa Southern Utilities Co. vs. Cassill, supra,* the Circuit Court of Appeals for the Eighth Circuit following its earlier decision in *City of Campbell, Mo. vs. Arkansas-Missouri Power Co.,* held that the plaintiff, the owner of a franchise in the town of Lenox, was entitled to protection against unlawful competition and to enjoin the municipality from constructing a plant, if its action in so doing was illegal or unconstitutional. However, upon the merits, the court held that under the Constitution of Iowa, the contract was not illegal.

In each of the cases cited, the courts recognized that such illegal competition can only result in serious and direct injury to the existing utility.

In this case, the bill alleges, and for the purpose of this hearing it is admitted, that the proposed competition of the municipality will injure the property of appellee. The appellee, therefore, clearly shows that it has an interest and property right which is entitled to protection; that it is subject to special and direct injury and, therefore, is entitled to challenge the constitutionality of the act which will result in such injury.

The cases cited above involve the protection of property under the due process clause of the Fourteenth Amendment. The same rule applies to injury brought about by the Federal Government or under Federal statutes since the due process clause of the Fifth Amendment is a like restriction. In *Heiner vs. Donnan,* 285 U. S. 312, Mr. Justice Sutherland, on page 326, says: "The restraint imposed upon legislation by the due process clauses of the two amendments is the same."

Counsel for the appellant Ickes contends that the appellee suffers no injury from the loan and grant of moneys by the Public Works Administration, but whatever injury it suffers arises from the use by the defendant city and its officers of the money so loaned and granted and not from the loan and grant. If the loan and grant are for the specific purpose

of constructing a municipal plant and the funds cannot be used for any other purpose, it seems illogical to say that the competition arising from a municipal plant financed by the Public Works Administration and the construction of the municipal utility are not so bound up that they must stand or fall together.

REMEDIES AVAILABLE TO PLAINTIFF

Attempt is made by counsel for appellants to distinguish *City of Campbell, Mo. vs. Arkansas-Missouri Power Co.* upon the ground that the City of Campbell was trying to act in violation of the Constitution of Missouri, which unlawful act would result in injury to the plaintiff. The franchise there, as here, was not exclusive.

Counsel for appellant Ickes also contends that the *Campbell* case is authority for the proposition only that if the taxing power is illegally exercised the proposed competition is illegal, and it is asserted in his brief with respect to that case that the competition causing the injury was illegal; while here the claimed illegality is not in the competition, but in the financing thereof. Counsel is forced to illogical and unreasonable argument to support his cause. The injury which appellee seeks to prevent is illegal competition resulting from the conduct both of the defendant municipality and its officers and the defendant Ickes, in violation both of the Constitution of the United States and of the Constitution of the State of Idaho.

In *City of Campbell, Mo. vs. Arkansas-Missouri Power Co.* and in *Iowa Southern Utilities Co. vs. Cassill,* the court recognized that illegal competition by the construction of a municipal plant necessarily results in serious and direct injury to the existing utility. In both of those cases that question was passed upon before inquiring into the legality of the proceedings, which in the one case was challenged as being violative of a provision in the Missouri Constitution, and in the other as violative of a similar provision in the Iowa Constitution. In the *Campbell* case, on the merits, it was held that the proceedings were violative of the Missouri Constitution. In the *Iowa* case it was held that they were not violative, but in both cases the right of the plaintiff to maintain the action was recognized. In both the above cases, the question of illegal competition arose out of the claimed illegality in the financing of the plant.

Appellee brings itself within the rule announced in both of those cases as well as the rule announced in *Massachusetts vs. Mellon.* It is able to show that it has sustained or is immediately in danger of sustaining a direct injury as the result of an enforcement of an unconstitutional statute—in this case a statute violative of the Federal Constitution.

Attempt is also made to distinguish *Frost vs. Corporation Commission of Oklahoma,* on the ground that the injury complained of there and the illegal

competition sought to be restrained arose from a violation of a statute of Oklahoma.

In this case, appellee asserts that the plan for financing the municipal plant involves not only a violation of the Idaho Constitution and statutes but a violation of the Federal Constitution and statutes.

It is a settled principle that an injurious act suffered or threatened under an unconstitutional statute entitles one who is injured to an injunction.

> *Pierce vs. Society of Sisters of Holy Names,* 268 U. S. 510;
>
> *Adkins vs. Children's Hospital,* 261 U. S. 525;
>
> *Philadelphia Co. vs. Stimson,* 223 U. S. 605.

The first case involves the due process clause of the Fourteenth Amendment. *Adkins vs. Children's Hospital* involves the due process clause of the Fifth Amendment. The last two cases involve an injunction against a Federal officer from carrying out the provisions of an unconstitutional statute.

In *Philadelphia Co. vs. Stimson,* Justice Hughes said:

> "Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing, in the name of the state, unwarrantable exactions or restrictions, to the irreparable loss of the com-

> plainant, which is the basis of the decree. * * * And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property."

PLAINTIFF MAY ENJOIN UNAUTHORIZED APPROPRIATION, EVEN IF ACT IS CONSTITUTIONAL

If, however the statute is not unconstitutional as violative of the General Welfare Clause or violative of the Constitution as an unlawful delegation of power, still, this suit may be maintained, provided the appropriation and the loan and grant to the City of Coeur d'Alene is not authorized by the National Industrial Recovery Act. This is founded upon the principle that one who may suffer irreparable injury from the violation of a prohibitory statute, or from an act otherwise unlawful or tortious, is entitled to injunctive relief.

> *Goldfield Con. Min. Co. vs. Richardson,* 194 Fed. 198;
>
> *In re Debs,* 158 U. S. 564.

Goldfield Consolidated Mines Co. vs. Richardson sought to enjoin defendants from the purchase of gold ore stolen from complainants' mines. Plaintiff alleged that the defendants purchased the ore from the employes of the plaintiffs who had stolen the

same from plaintiffs. Purchasing the stolen ore with knowledge that it was stolen was forbidden by criminal statutes. The defendants maintained that a restraining order could not be granted to enforce such a statute. The court held that purchasing the stolen ore is as clearly and distinctly wrong as the original theft; that actions at law might be had for each wrong, but they would not provide adequate remedies and that an injunction should issue to enjoin acts which were destructive of property rights even though they in themselves were criminal.

If the proposed loan and grant is not contemplated by Title II of the National Industrial Recovery Act, the appropriation will violate the constitutional provisions against drawing money from the treasury except in consequence of appropriations made by law.

Const., Art. I, Sec. 9, Clause 7.

It would also violate the provisions of an act of Congress prohibiting the expenditure of money in excess of the appropriations made by Congress, and under such statute will constitute a misdemeanor.

Title 31, USCA, Sec. 665.

The cases which have been cited and particularly *Philadelphia vs. Stimson,* settle the doctrine that Federal officers acting in excess of statutory authority or under an unconstitutional statute act as individuals and that a suit against them is not a suit

against the United States. Therefore, if the provisions of the National Industrial Recovery Act are unconstitutional, or if the defendant Ickes is acting in excess of statutory authority the appellee had a clear right to maintain a suit to enjoin the consummation of the loan and gift.

APPELLEE IS ENTITLED TO MAINTAIN AN ACTION AGAINST THE MUNICIPALITY AND ITS OFFICERS

A municipality and its officers certainly can be enjoined from carrying out an illegal and unconstitutional application of public funds. If the grant and loan are unconstitutional, there is a misapplication of funds. Appellee could have enforced its right against the municipality and its officers alone. In *Missouri Public Service Co. vs. City of Concordia, supra,* a case in which the Federal Administrator was not a party, the court said:

> "It is obvious that the defendants propose to construct a plant because of plans and aid promoted, formulated, and granted by the Administrator of the Federal Emergency Administration of Public Works. If this be illegal, then, upon the bill, plaintiff is entitled to the relief sought. By appropriate averments it has challenged the legality of the project because of the circumstance that the Congress, in promoting the project, has exceeded its constitutional powers, or that the Administrator was acting in excess of his powers."

The present suit was brought before the loan and grant had been consummated. What reason can exist why the suit cannot be brought against the

consummation of the illegal plan to finance the construction of a competing municipal plant as properly and readily as it could be brought against the construction of the plant itself? That such action may be brought is supported by *City of Campbell, Mo. vs. Arkansas-Missouri Power Co., Iowa Southern Utilities Co. vs. Cassill,* and *Missouri Pub. Service Com. vs. City of Concordia.*

City of Allegan vs. Consumers' Power Co., 71 Fed. (2) 477 is a case in which the plaintiff sued merely as a taxpayer.

In *Puget Sound Power & Light Co. vs. City of Seattle,* 291 U. S. 619, the Puget Sound Company denied the right of the city to tax it where it was a competitor with the city. The Supreme Court held that the city had the right so to tax it. The competition which was complained of was held to be lawful.

Two other cases are cited—*Missouri Utilities Co. vs. City of California,* 8 Fed. Supp. 454, and *Arkansas-Missouri Power Co. vs. City of Kennett,* decided February 25, 1935, in the District Court for the Southeastern Division of the Eastern District of Missouri. These cases hold that an existing utility may not maintain an action against a municipality to enjoin the consummation of an unconstitutional grant and loan of Federal money and are at variance with the cases which we have cited and the decision of Judge Cavanah in this case.

In *Missouri Utilities Co. vs. City of California,* the Public Works Administrator intervened and was made a party defendant. The District Court in its opinion held that under the National Industrial Recovery Act appropriations made by the Public Works Administration to assist municipalities in the construction of electric generating and distribution systems are constitutional and also reaches the conclusion that even if such appropriations were invalid under the General Welfare Clause, an existing utility would have no right to raise that question or to maintain a suit for injunctive relief. With respect to the General Welfare Clause, we shall refer to the case elsewhere. The Court undertakes to base its conclusion that no remedy exists upon the ground that there was no taking under the Fourteenth Amendment since the municipality was not engaged in an unlawful undertaking and that there was no taking by the Federal Government under the Fifth Amendment since the appropriation of moneys for the construction of the plant could not constitute a taking. The court argues in reaching this conclusion that a donation or gift by John D. Rockefeller of moneys to the City of California to build a plant could not constitute a taking of the property of the utility or if one owned a library in the City of California and made a profit by renting books to the citizens and Andrew Carnegie gave money to the city for the building of a free library that would not be taking the plaintiff's property and that neither the utility nor the owner of the

library could object. It is conceded in the opinion of the court that such gifts by Rockefeller or Carnegie would be lawful, that therefore, the taking of the plaintiff's property would be lawful. From this, it is argued that if Mr. Rockefeller or Mr. Carnegie might have lawfully provided the money and caused the construction of the competing municipal utility or free library, then the existing utility or the owner of the library is without remedy against anyone unlawfully causing such competition and resulting damage. If that argument is sound, the decisions in *Frost vs. the Corporation Commission* and *City of Campbell, Mo. vs. Arkansas-Missouri Power Company,* were both wrong and in *Iowa Southern Utilities Co. vs. Cassill; Oklahoma Utilities Co. vs. City of Hominy* and *Guadeloupe vs. Porto Rico Light & Power Co.* the courts should not have inquired into the question of the legality or lawfulness of the competition. The argument condemns itself.

Another argument advanced by the court in the *California case* is that the injury to the utility is produced by the building and operation of the competing utility and not by the loan or gift which alone made its construction possible. By the terms of the National Industrial Recovery Act, the loan and grant are made for a required use and a contract requiring the expenditure of the money for that use is required by the Administrator. How can the loan and grant be separated from the building

of the plant? The loan and grant contract between the Public Works Administration and the city provides the manner of construction, many terms with respect to method, etc., as well as an attempt to control rates.

Elsewhere in his opinion the District Judge says that what is referred to as a gift is not a gift at all but is a grant to the City of California, annexed to which are onerous conditions. The proposed loan and grant contract in this case (Ex. D., R., p. 91) shows that the Public Works Administrator assumes to control and regulate the expenditures of the city.

The loan and the gift without which it is conceded the city cannot build this plant (as it proposes to expend more than the amount authorized by the voters) shows that the loan and grant and the construction are part and parcel of one and the same transaction.

The District Court in the *California* case further takes a narrow view of what constitutes the taking of private property by the Federal Government. It assumes almost that physical taking is essential and yet, on page 465 the Court, in its opinion, concedes that taking the facts as alleged in the bill as true, the value of the property of plaintiff will be lessened and the construction of the municipal plant may altogether destroy its value and then argues that the appropriation of money by the United

States, although to be used for that specific purpose does not hurt the plaintiff.

Any action which illegally deprives property of value in whole or in part is a deprivation of property without due process of law.

Smyth vs. Ames, 169 U. S. 466.

In that great case the court asserted its power at page 527 as follows:

> "The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation."

We may further say that even if there is no deprivation of property within the meaning of the Fifth and Fourteenth Amendments, if the competition is unlawful, then the utility has a right to enjoin such unlawful and illegal competition. To say that there is a right without remedy denies the existence of the right.

In *Arkansas-Missouri Power Company vs. Kennett,* in the District Court for the Eastern District of Missouri, Judge Faris held that the utility had no standing to maintain an action. In the brief of

Counsel for the Administrator it is said that he is the Judge who wrote the decision in the *Campbell* case. That is in error. The *Campbell* case was tried before him as District Judge but he was not a member of the Court of Appeals at the time it was decided nor did he participate in the hearing in the Court of Appeals. He concedes that the plaintiff will be hurt as a necessary and direct consequence of what the defendant Ickes proposes to do and which he says the city has the legal power to do and proposes doing. He argues that even if the National Industrial Recovery Act had never been passed, the City of Kennett could and undoubtedly would have built the plant with the proceeds of the bonds which had been authorized. He concedes that the $30,000.00 grant (which he calls gratuitous) is not in the same category as the money received from the bonds, is a mere fortuitious thing. (It appears that the issue of bonds authorized was less than the total loan and grant.) In this respect he disagrees with the conclusion in the *City of California* case. He holds that the failure of the gift would not afford an insurmountable barrier to the construction of the plant and he concludes that the plaintiff's hurt will accrue directly from the City of Kennett doing what it had power to do, and that the threatened act of defendant, Ickes, is not the direct cause of the thing of which the plaintiff complains. Here, again he undertakes to separate the furnishing of the money from the construction of the plant, all of which constitute one and the same transaction. The

judge undertakes to distinguish *City of Campbell, Mo. vs. Arkansas-Missouri Power Co.* by saying that the *City of Campbell* was trying to do an act in the teeth of the Constitution of Missouri, which unlawful act would result in injury to the plaintiff there. He disregards the fact that in the case before him the defendants were trying to do an act in the teeth of the Constitution of the United States—to use moneys of the United States appropriated in violation of the Constitution of the United States under an act which was further unconstitutional in undertaking to delegate power to an executive officer which Congress could not delegate, and further that the moneys were being used for purposes which are not within the provisions of Sections 202-203 of Title II of the National Industrial Recovery Act. He undertakes further to say that if the action of plaintiff be carried to a successful conclusion such result will stop the defendant city only until it shall be able to find another buyer for its bonds. In other words, that even if the acts of the defendants are illegal and violative of the Federal Constitution, the utility should be denied relief against such acts, even though it is concededly injured, because perchance the moneys may be found elsewhere and acquired in a legal way. That case is now on appeal.

POWERS OF FEDERAL GOVERNMENT

The government of the United States is one of delegated powers, its authority defined and limited by the Constitution.

Martin vs. Hunter's Lessee, 1 Wheaton, 304;

Kansas vs. Colorado, 206 U. S. 46 at pages 89 to 91;

Calder vs. Bull, 3 Dallas, 386;

United States vs. Cruikshank, 92 U. S. 542;

United States vs. Harris, 106 U. S. 629;

Ex parte Milligan, 4 Wall. 2;

Houston vs. Moore, 5 Wheaton, 1, 48.

Perhaps the finest statement of the powers of the Federal Government and the limitations upon its power is found in *Kansas vs. Colorado,* 206 U. S. 46 at pages 89 to 91:

> "But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment. *This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted.* With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the

future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to-wit: 'the people.' Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it—'We, the people of the United States,' not the people of one state, but the people of all the states; and Article 10 reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adoptd the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article 10 is not to be shorn of its meaning by any narrow or technical construction but is to be considered fairly and liberally so as to give effect to its scope and meaning."

No finer statement of constitutional limitations has ever been made than that of Grover Cleveland in his Veto Message of March 2, 1889, returning without approval a bill to credit and pay to the several states and territories and the District of Columbia all the moneys collected under the direct tax levy by Congress approved August 5, 1861, where he said:

> "It is my belief that this appropriation of the public funds is not within the constitutional power of the Congress. Under the limited and delegated authority conferred by the Constitution upon the General Government the statement of the purposes for which money may be lawfully raised by taxation in any form declares also the limit of the objects for which it may be expended. * * *
>
> "The expenditure cannot properly be advocated on the ground that the general welfare of the United States is thereby provided for or promoted. This 'general welfare of the United States,' as used in the Constitution, can only justify appropriations for national objects and for purposes which have to do with the prosperity, the growth, the honor, or the peace and dignity of the nation.
>
> "A sheer, bald gratuity bestowed either upon States or individuals, based upon no better reason than supports the gift proposed in this bill, has never been claimed to be a provision for the general welfare. More than fifty years ago a surplus of public money in the Treasury was distributed among the States; but the unconstitutionality of such distribution, considered as a gift of money, appears to have been conceded, for it was put into the State treasuries under the guise of a deposit or loan, subject to the demand of the Government."

Messages and Papers of the Presidents, Vol. VIII, pp. 837, 839-40.

GENERAL WELFARE CLAUSE

Views of Appellee

(a) That under the General Welfare Clause of the Constitution, Congress has no power to tax or appropriate moneys for objects not within the enumerated powers expressly delegated to the Federal Government.

(b) That even if it should be held that Congress has power and the General Welfare Clause authorizes Congress to levy taxes and appropriate moneys for objects not within the enumerated powers expressly delegated to the Federal Government, still the proposed loan and grant in this case violates the Constitution because in any event such taxation and appropriation must be restricted to purposes of general not local benefit, and the proposed construction of a generating plant and distribution system in the City of Coeur d'Alene is not for any public use or purpose affecting the general welfare of the United States.

Appellants' Views

Appellants maintain that Congress has power to appropriate money for the promotion of the general welfare and is not restricted in so doing to purposes germane to other delegated powers; that Congress has the power to appropriate money to further

the so-called general welfare for purposes as to which the Constitution does not authorize legislation, that it is left to the discretion of Congress to pronounce what objects concern the general welfare and for which, under that description, appropriation of money may be made; and that such power cannot be reviewed by the courts.

So far as the Supreme Court is concerned, the interpretation of the General Welfare Clause is an open constitutional question. That court has never construed it.

Two views have been advanced as to the correct interpretation—one referred to in the literature of the Constitution as the "Madison view", and the other as the "Hamilton view".

Judge Cavanah's View

Judge Cavanah in this case holds that the clause is not a grant of power, but a limitation on the power to tax, adopting the Madison view. But he aptly points out that "the interpretation of the phrase 'general welfare' given by Hamilton limits its operation in the appropriation of money by Congress to matters general and not local." (R., p. 180.)

He says:

> "The construction urged by the defendants, that although Congress may not regulate subject-matters on which the Constitution does not authorize legislation, yet it may promote them

by appropriation and prescribe how such appropriation shall be applied, as the Constitution leaves it to the discretion of Congress to pronounce upon the objects which concern the general welfare and for which appropriations of money is requisite and proper without any limitation as to the objects being in fact general—such construction would seem to contradict itself, for if Congress is not authorized legislate upon a certain subject-matter, then it would follow that it may not appropriate money to carry out such unauthorized subject-matter. It certainly would not have power in the first instance to authorize the Administrator to construct the system in the City of Coeur d'Alene, and, if so, then an attempt to appropriate money for the city to do so would be indirectly exercising a power it did not have. To say that Congress has power to declare certain purposes to be national, when as a matter of fact they are not and have no relation to the nation and are strictly local in a state, would defeat and nullify the express provisions of the Constitution limiting the power of Congress. The fact here is an apt illustration of this assumed authority, where the construction of a Diesel engine plant and light system, in and to be used solely by the inhabitants of the City of Coeur d'Alene, would not in any way be for a national purpose, and to assert under the facts in the bill that its construction would relieve unemployment, and that an emergency existed, does violence to the English language. The true principle is well settled in *Linder vs. United States,* 268 U. S. 5, as follows: 'Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. And we accept as established doctrine that any provisions of an

act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be enforced.'" (R., pp. 182, 183.)

The Views of Madison and Hamilton

Madison's view as to the correct interpretation of the General Welfare Clause is stated in the Federalist No. XLI.:

"Some who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed, that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even

to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms 'to raise money for the general welfare.'

But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even seperated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded, as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter.

The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the articles of Confederation. The objects of the Union among the States, as described in article third, are, 'their common defense, security of their liberties,

and mutual and general welfare.' The terms of article eighth are still more identical: 'All charges of war and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress, shall be defrayed out of a common treasury,' etc. A similar language again occurs in article ninth. Construe either of these articles by the rules which would justify the construction put on the new Constitution, and they vest in the existing Congress a power to legislate in all cases whatsoever. But what would have been thought of that assembly, if, attaching themselves to these general expressions, and disregarding the specifications which ascertain and limit their import, they had exercised an unlimited power of providing for the common defense and general welfare? I appeal to the objectors themselves, whether they would in that case have employed the same reasoning in justification of Congress as they now make use of against the convention. How difficult it is for error to escape its own condemnation."

The Hamilton view is found in his Report on Manufactures as follows:

"It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an application of money.

> The only qualification of the generality of the phrase in question, which seems to be admissible, is this: That the object to which an appropriation of money is to be made be general, and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot.
>
> No objection ought to arise to this construction, from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication."

Hamilton limited the phrase by saying that the object to which the appropriation of money is to be made must be general and not local.

It is not our purpose to extend the discussion of the difference between these two views. Under either view, th appropriation and grant and loan which is enjoined in this case is unconstitutional. The Madison view, however, is supported historically by the highest authority and has generally been accepted. It would be impracticable to incorporate within this brief these citations. We shall endeavor to collect them in an appendix for the convenience of the court.

The Madison view is supported by the following authorities:

The State Papers of Jefferson, Madison, Monroe, Jackson, Pierce and Cleveland, referred to hereinafter.

The Making of the Constitution by Charles Warren;

Congress as Santa Claus by Charles Warren;

Our National Constitution: Provisions for the General Welfare, by Albers, 9th Boston University Law Review, 152;

John Randolph Tucker on the Constitution, Vol. I, pp. 478-480;

Virginia Resolutions of January 8, 1800, Writings of James Madison, Hunt Edition, Vol. VI, p. 341;

Madison's Letter to Andrew Stevenson of Nov. 27, 1830, Writings of James Madison, Hunt Edition, Vol. X, p. 411;

Madison's Letter to Edmund Pendleton, Writings of James Madison, Vol. 1, p. 545; Vol. IV, p. 171.

Opposed to this generally accepted view are the writings of Corwin, The Twilight of the Supreme Court and an article by him in the Harvard Law Review; Willoughby on The Constitutional Law of the United States and the views expressed by Story.

As Charles Warren points out in the The Making of the Constitution, in considering of the validity of Judge Story's interpretation, it must always be born in mind that Story's Commentaries was published prior to the publication of Madison's Notes

on Debates and without any knowledge of the discussions in the Convention, other than the records of the motions and votes contained in the Journal of the Convention. While Story adopted the view of Hamilton, he, nevertheless, was forced in concluding his discussion to say:

> "The truth is, (as the historical review also proves), that after it had been decided that a positive power to pay the public debts should be inserted in the Constitution, and a desire had been evinced to introduce some restriction upon the power to lay taxes, in order to allay jealousies and suppress alarms, it was (keeping both objects in view) deemed best to append the power to pay the public debts to the power to lay taxes; and then to add other terms, broad enough to embrace all the other purposes contemplated by the Constitution. Among these none were more appropriate than the words 'common defense and general welfare,' found in the Articles of Confederation, and subsequently with marked emphasis introduced into the preamble of the Constitution. To this course no opposition was made, because it satisfied those who wished to provide positively for the public debts, and those who wished to have the power of taxation co-extensive with all constitutional objects and power." (Sec. 930, Story on the Constitution, 4th Ed., Vol. 1.)

We may close this discussion by referring to the fact that of all the men who knew or should have known the intent of the framers of the Constitution Madison stood first. He attended conscientiously the meetings of the Convention from the time it opened until it closed. Hamilton, on the other

hand, after the defeat of his plan for a Federal Government, returned to his practice in New York, and thereafter gave little attention to the proceedings of the Convention. It is true that after the Constitution was adopted by the Convention, Hamilton did great service in securing its ultimate ratification. It will not be denied that if it had been thought that the general government was invested with such power as is now claimed by appellants, the Constitution would never have been adopted.

We have incorporated some discussion of the question of the construction of the General Welfare Clause as viewed by Madison and by Hamilton. This is deemed proper for a full presentation of the problem. As the court below held and as we maintain, Madison correctly interpreted the clause, but as the court below held and as we maintain, that is not decisive of the question in this case, because even under the Hamilton interpretation, the project under consideration must be condemned because it is not for a national or general but for a local purpose.

JEFFERSON'S VIEW

We desire to refer to the view of Jefferson, expressed in his opinion on the constitutionality of the First Bank of the United States:

> "To lay taxes to provide for the general welfare of the United States is to lay taxes for the

purpose of providing for the general welfare. For the laying of taxes is the power, and the general welfare the purpose, for which the power is to be exercised. Congress are not to lay taxes ad libitum, for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please which might be for the good of the Union, would render all the preceding and subsequent enumeration of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil; it would be also a power to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless. Certainly, no such universal power was meant to be given them. It was intended to lace them up strictly within the enumerated powers, and those without which, as means, these powers could not be carried into effect."

The Writings of Thomas Jefferson, Library Ed., Vol. 3, p. 148.

He definitely adopted the same view in his message to Congress on December 2, 1806.

It is said by commentators that Monroe originally adopted the Madison view, but finally by his message of May 4, 1822, in connection with the veto of a bill for the preservation and repair of the Cumberland Road, changed his views. That change is of no comfort or avail to appellants, for he distinctly stated:

> "My idea is that Congress have an unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate it to purposes of common defense and of general, not local, national, not State, benefit."

So, even if one accepted the Hamilton view or the later opinion of Monroe, the appellants are not aided, because the limitations expressed by Hamilton and Monroe are as fatal to their cause as the interpretation of Madison.

Charles Evans Hughes' Views

One other citation. Our present Chief Justice before his appointment presented an argument before the Federal Oil Conservation Board with reference to the power of Congress to control the production or refining of oil and therein discussed the General Welfare Clause. He said:

> "It may therefore be safely taken for granted that under the powers to regulate commerce Congress has no constitutional authority to control the mere production of petroleum on lands (other than Indian lands) within the territory of a State. All plans for requiring

unit operation or otherwise, which involve the assertion of such a power on the part of Congress do not require discussion. They proceed from an utterly erroneous conception of Federal power. It does not further the policy of conservation to take up the public attention with futile proposals which disregard the essential principles of our system of government." * * *

"I am aware that it has been suggested that such Federal power to control production within the states might be asserted by Congress because it could be deemed to relate to the provision for the common defense and the promotion of the general welfare."

"Reference is sometimes made in support of this view to the words of the preamble of the Federal Constitution. But as Story says 'The preamble never can be resorted to to enlarge the powers confided to the general government or any of its departments. It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given." * * *

"The suggestion to which I have referred is an echo of an attempt to construe Article 1, Section 8, Subdivision 1 of the Constitution of the United States, not as a power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States,' but as conferring upon Congress two distinct powers, to-wit: (1) the power of taxation and (2)

the power to provide for the common defense and the general welfare. In this view, it has been urged that Congress has the authority to exercise any power that it might think necessary or expedient for the common defense or the general welfare of the United States. Of course, under such a construction the government of the United States would at once cease to be one of enumerated powers and the powers of the states would be wholly illusory and would be at any time subject to be controlled in any matter by the dominant Federal will exercised by Congress on the ground that the general welfare might thereby be advanced. That, however, is not the accepted view of the Constitution. (1 Story on the Constitution, Secs. 907, 908; 1 Willoughby on the Constitution, Sec. 22.) The government of the United States is one of enumerated powers and is not at liberty to control the internal affairs of the states respectively such as production within the States, through assertion by Congress of a desire either to provide for the common defense or to promote the general welfare." (Quotation from *Panama Refining Co. vs. Ryan,* 5 Fed. Supp. 639-647.)

THE PROJECT IS LOCAL IN CHARACTER

Even if the Hamilton view were adopted and it was held that the General Welfare Clause authorizes Congress to levy taxes and appropriate moneys for the general welfare of the United States, though not in furtherance of the enumerated powers, still, the proposed loan and grant to the City of Coeur d'Alene does not come within the definition of Ham-

ilton, because even under his view the appropriation of moneys must be for objects which are national—not local—in character.

The facts set forth show that this grant and loan is for a small local Diesel engine generating plant and distribution system in the City of Coeur d'Alene, purely intrastate.

The levying of taxes and appropriation of moneys are but incidental purposes of government. Taxes and appropriations are the means through which government exercises its powers. The general government, the state governments, the municipal governments are each granted certain powers. In the exercise of those powers, each may tax and may make appropriations, but such taxation and such appropriation is and must be limited to the purposes for which the particular government is authorized. This is involved in the fundamental distinction between the powers of the Federal Government and the powers of the state governments. If the power to tax or to appropriate moneys existed independent of and beyond those granted powers, then through the exercise thereof the general government could assume to itself all of the prerogatives of the states and of the subdivisions of the states.

If the general government in this case under the guise of the power to tax and to appropriate moneys, can loan 70% and grant 30% of the cost of a local lighting system in the City of Coeur

d'Alene and impose upon the city conditions with respect to rates, services, etc., then it could as well appropriate 30% of the cost of running the municipal government and in connection therewith provide by contract the manner in which the municipal government should be operated, and, according to the views of the appellants, that would be beyond the control of the judicial power.

By the same rule, the general government, for the purpose of carrying out some assumed "socially desirable" program could subsidize a newspaper in Coeur d'Alene or furnish funds for a municipal newspaper to spread the good word around, and this perversion of the Federal power and waste of Federal money would, according to appellants, be impregnable to judicial control. Can it be claimed that because Congress or an executive officer declared that it was for the general welfare to have a good hotel in Coeur d'Alene that moneys of the Federal Government could be expended therefor?

Franklin Pierce in his Veto Message of May 3, 1854, said:

> "To say that it was a charitable object is only to say that it was an object of expenditure proper for the competent authority; but it no more tended to show that it was a proper object of expenditure by the United States than is any other purely local object appealing to the best sympathies of the human heart in any of the States. And the suggestion that a school for the mental culture of the deaf and

dumb in Connecticut or Kentucky is a national object only shows how loosely this expression has been used when the purpose was to procure appropriations by Congress. It is not perceived how a school of this character is otherwise national than is any establishment of religious or moral instruction. All the pursuits of industry, everything which promotes the material or intellectual well-being of the race, every ear of corn or boll of cotton which grows, is national in the same sense, for each one of these things goes to swell the aggregate of national prosperity and happiness of the United States; but it confounds all meaning of language to say that these things are 'national', as equivalent to 'Federal', so as to come within any of the classes of appropriation for which Congress is authorized by the Constitution to legislate."

Messages and Papers of the Presidents, Vol. V., p. 255.

These matters of local concern are not within the powers granted to the Federal Government. In *Miles Planting & Mfg. Co. vs. Carlisle,* 5 App. Cas., Dist. of Columbia, p. 138, the court said:

"We think the authorities cited above establish beyond question that the power of taxation, in all free governments like ours, is limited to public objects and purposes governmental in their nature. No amount of incidental public good or benefit will render valid taxation, or the appropriation of the revenues to be derived therefrom, for a private purpose."

The power of a legislature to levy or to authorize the levy of a tax, and to create or authorize the

creation of a public debt to be paid by taxation, is limited to its exercise for a public purpose.

Dodge vs. Mission Township, 107 Fed. 827.

In that case, the court held that the question whether a tax or public debt is for a public or private purpose is not a legislative but a judicial function; that a legislature cannot make a private purpose a public purpose, or draw to itself or create the power to authorize a tax or a debt for such a purpose, by its mere fiat. An act was under consideration in that case for the promotion of the construction and operation of mills and factories to manufacture sorghum cane into sugar or syrup, which the court held a private and not a public purpose.

In *Savings & Loan Assn. vs. Topeka,* 20 Wall. 655, the Supreme Court held that there is no such thing in the theory of our governments, state and national, as unlimited power in any of their branches; that the executive, legislative and judicial departments are all of limited and defined powers; among these is the limitation of the right of taxation, namely, that it can be used only in aid of a public object, an object which is within the purpose for which governments are established.

PRACTICE OF CONGRESS

If anything were needed to show the weakness of appellants' position, it is but necessary to examine the arguments presented to support this proceeding.

The position of appellants is that the clause does not restrict appropriations to the subject-matters upon which Congress may legislate; that Congress may declare what constitutes the general welfare so long as that power is exercised in levying taxes and making appropriations, and that such power cannot be reviewed by the courts.

The practice of Congress to appropriate money for purposes not authorized by the Constitution is urged as supporting this position. The brief of appellant Ickes lists a large number of these alleged appropriations.

That too much weight should not be given to such practice of Congress could not be better shown than in the legislative history of the National Industrial Recovery Act.

Appellants now rely upon the General Welfare Clause as authorizing, and empowering Congress to pass the legislation. In hearings before the Committee on Finance of the United States Senate on the Act, Senator Wagner, of New York, who had charge of the matter, admitted that such power as was given under the act came from the Commerce Clause and not from the General Welfare Clause, as is shown by the following:

"SENATOR CONNALLY: You are basing your whole power to do this thing on the interstate commerce clause, are you not?

SENATOR WAGNER: Yes; absolutely.

SENATOR COUZENS: And welfare.

SENATOR WAGNER: And welfare, to a limited extent.

SENATOR CONNALLY: The welfare clause doesn't mean much so far as power is concerned?

SENATOR WAGNER: It refers to appropriations."

Appropriations entirely improper will no doubt be found. Interested congressmen or groups seeking the appropriation are little concerned with the constitutional basis for them, and many escape attack because there is no one with legal right to complain. A taxpayer as such cannot enjoin them. Again in most cases there is no one with sufficient interest to complain. Many of them are for the relief of distress and suffering and have no injurious effect upon the business and property rights of the people. A careful analysis of such cases will disclose that most of them have been justified either wholly or in part upon one of the enumerated powers, such as the power to take land for the purpose of a custom house, which was held in *Chappell vs. United States,* 160 U. S. 499, to come within the power to control navigation, or upon the ground

that where legislation is *in fact* within an enumerated power, it cannot be successfully attacked because it also incidentally or collaterally serves a purpose not within the powers of the Federal Government as in *Arizona vs. California,* 283 U. S. 423.

But the Supreme Court has said that even such practice, no matter how long continued, cannot establish a precedent against the conviction that such legislation is clearly unconstitutional. In *Myers vs. United States,* 272 U. S. 52, the court said:

> "In spite of the foregoing Presidential declarations, it is contended that since the passage of the Tenure of Office Act, there has been general acquiescence by the Executive in the power of Congress to forbid the President alone to remove executive officers, an acquiescence which has changed any formerly accepted constitutional construction to the contrary. Instances are cited of the signed approval by President Grant and other Presidents of legislation in derogation of such construction. We think these are all to be explained not by acquiescense therein, but by reason of the otherwise valuable effect of the legislation approved. Such is doubtless the explanation of the executive approval of the Act of 1876, which we are considering, for it was an appropriation act on which the section here in question was imposed as a rider.
>
> "In the use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of

> the Government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded. When instances which actually involve the question are rare or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time as showing general acquiescence in the legislative assertion of a questioned power is minimized."

In *Miles Planting & Mfg. Co. vs. Carlisle,* 5 Appeal Cases, District of Columbia, 138, at page 161, it is said:

> "All such acts, however, no matter how worded or devised have met with determined opposition and denial of power at all times; and it cannot be said that they have ever received general consent or acquiescence. The fact that moneys have often been paid out under acts of doubtful or questionable validity can have no great weight, under a system where the question, by reason of difficulties before alluded to, is so hard to be raised in an effective manner.
>
> "But if there had been a practice by Congress, uniform and generally acquisced in, our opinion is so clearly against the validity of this act that we could not be controlled by it in the performance of our duty. No time, no acquiscence, no estoppel runs against the people under the protection of our written Constitution."

The case was one brought by a sugar planter who sought mandamus to compel the Secretary of the Treasury to pay the sugar bounty authorized by the McKinley bill. The government contended, among

other things, that it was beyond the power of Congress to appropriate money for such a bounty. The court held the statute was unconstitutional upon the ground that the power of the Federal Government to appropriate money under Article I, Section 8, Clause 1 is limited to a governmental purpose—that is—an authorized governmental function of the Federal Government.

This is the same act which was the subject of investigation in *Field vs. Clark,* 143 U. S. 649, in which the court found it unnecessary to pass upon the constitutional question.

In *United States vs. Boyer,* 85 Fed. 425-432, upon this question the court said:

> "No case has been cited tracing the power to enact any statute to the general welfare clause above quoted, and I do not believe any can be. The learned counsel, in this connection, has cited various acts of congress of a nature quite similar to the one in question, but no number of statutes or infractions of the constitution, however numerous, can be permitted to import a power into the constitution which does not exist, or to furnish a construction not warranted. They, too, must stand or fall, when brought in question, by the same principles which are to be applied alike in all cases."

ATTITUDE OF THE EXECUTIVE BRANCH OF THE GOVERNMENT

In *Myers vs. United States,* 272 U. S. 52, on page 170, the Supreme Court says that "in the use of Congressional legislation to support or change a

particular construction of the Constitution by acquiescence," the attitude of the executive branch should be considered.

That Congress has not an unlimited discretion in taxation and appropriation of public money, but is confined to the national purposes set forth in the Constitution, is suported by the following Executive Papers in the Messages and Papers of the Presidents:

Jefferson: Sixth Annual Message, Dec. 2, 1806, Vol. I., p. 405;

Madison: Veto Message, March 3, 1817, Vol. I., pp. 584-585;

Monroe: First Annual Message, Dec. 2, 1817, Vol. II., pp. 11-18; Veto Message, May 4, 1822, Vol. II., pp. 142-143;

Jackson: Veto Message, May 27, 1830, Vol. II., pp. 483-488; Veto Message, Dec. 6, 1832, Vol. II., pp. 638-639;

Tyler: Veto Message, June 11, 1844, Vol. IV., p. 330;

Polk: Veto Message, Aug. 3, 1846, Vol. IV., pp. 460-462; Veto Message, Dec. 15, 1847, Vol. IV., p. 610;

Pierce: Message, Dec. 30, 1854, setting forth reasons for veto, August 4, 1854, Vol. V., pp. 257-259; Veto Message, May 3, 1854, Vol. V., pp. 247-255; Veto Messages, May 19 and May 22, 1856, Vol. V., pp. 386-387;

Cleveland: Veto Message, February 16, 1887, Vol. VIII., p. 557; Veto Message, March 2, 1889, Vol. VIII., pp. 837-839; Veto Message, May 29, 1896, Vol. IX., pp. 677-679.

DECISIONS INVOLVING THE GENERAL WELFARE CLAUSE

In *United States vs. Boyer,* 85 Fed. 425, the District court held that the General Welfare Clause does not confer any distinct and substantial power on Congress to enact any legislation.

In *Miles Planting & Mfg. Co. vs. Carlisle,* supra, the Court of Appeals for the District of Columbia held that Congress, under the General Welfare Clause had no power to enact the sugar bounty clause of the McKinley Tariff Bill. This involved the appropriation of Federal funds for a purpose which was beyond the enumerated powers of the Federal Government.

In *Amazon Petroleum Corp. vs. Railroad Commission,* supra, Judge Bryant quotes with approval the language of Chief Justice Hughes with reference to the General Welfare Clause to which we elsewhere refer.

In *Hart Coal Corp. vs. Sparks,* 7 Fed. Supp. 16, Judge Dawson says with reference to the General Welfare Clause:

> "Clause 1, Sec. 8, Art. 1, of the Constitution, which vests Congress with the power to lay and collect taxes, etc., is so punctuated that, if considered by itself, it might be construed as conferring two separate and distinct powers upon Congress—one to lay and collect taxes, and the other to pay the debts and provide for the common defense and general welfare of the United States. Of course, if such construction were given to this section, it would wipe out all

> limitations upon the powers of Congress and leave it with unlimited power to legislate for the general welfare of the United States. The inevitable result compels a rejection of such a construction."

The only cases in which this question has been squarely presented and squarely determined are the case at bar and the case of *Missouri Public Service Co. vs. City of Concordia,* heretofore discussed. There the court undertakes to sustain its position by referring to three authorities in the Supreme Court of the United States:

> *United States vs. Gettysburg R. Co.,* 160 U. S. 668;
> *United States vs. Realty Co.,* 163 U. S. 427;
> *Field vs. Clark,* 143 U. S. 649.

The decision concedes that in the Gettysburg case the most that can be said is that it constitutes strong *dictum* supporting the doctrine that the General Welfare Clause is an independent source of power. The court does not place its decision upholding the condemnation on that ground. In that case, a tract of land was being condemned for the purpose of preserving the lines of battle at Gettysburg, marking with tablets the tactical positions of the different organizations engaged in the battle, for cemeteries for the burial of deceased soldiers, and was related to the power to make war.

In *Field vs. Clark,* the Supreme Court had under consideration the McKinley Act, which among other

things appropriated money to pay a bounty to producers of sugar. The sole power relied on for the appropriation was the General Welfare Clause. The court expressly declined to pass upon the question, basing its decision upon the proposition that even if that clause of the act was unconstitutional, it did not affect the other provisions of the act.

In the later case of *United States vs. Realty Co.,* it appears that in 1894 the bounty provision of the McKinley law was repealed. An appropriation was made by Congress in 1895 for the payment of bounty claims arising under the Act of 1890 to certain manufacturers and producers of sugar who had complied in good faith with the Act of 1890. It was argued by counsel for the government that Congress had no power to recognize those clauses because the provision in regard to the payment of bounties in the Act of 1890 was unconstitutional. (The bounty provision had been held unconstitutional in *Miles Planting & Mfg. Co. vs. Carlisle,* supra.) The question of the General Welfare Clause was presented but the Supreme Court expressly refusd to pass on the question of the constitutionality of the sugar bounty.*

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*The court said:

> "In the view we take of these cases the rights of the parties may be passed upon and the actions finally decided without our entering upon a discussion as to the validity of the bounty legislation contained in the Act of 1890,

Certainly, the court in the *City of California* case misapplies this decision in undertaking to assert that it sustains its view. All that the Supreme Court held was that in a case where citizens had in good faith complied with an act of congress, after consummation of the transaction, a moral obligation might arise which Congress could recognize, but the case furnishes no basis for the claim that the United States would be compelled to recognize such a moral obligation.

The court's conclusion in the *City of California* case seems to be that because a moral obligation might arise between the parties, if a transaction was consummated, even though based upon an unconstitutional statute, that therefore in advance of the consummation, the illegal transaction cannot

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and without deciding that question. For the purpose of the discussion of this case we think it unnecessary to decide whether or not such legislation is beyond the power of Congress. (P. 434.) * * *

"We regard the question of the unconstitutionality of the bounty provisions of the Act of 1890 as entirely immaterial to the discussion here. (P. 437.) * * *

"It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises." (P. 440.)

be enjoined. The statement seems to carry its own refutation.

In the instant case, we are not dealing with a situation where anyone has expended money on the faith of some act of congress, but we are in the position of a property holder threatened with injury by an illegal appropriation of Federal moneys, anticipating that injury, and in advance of the injury preventing it.

There is one case in the Supreme Court, however, which expressly says that Congress has not the power to levy taxes for the purpose of legislating upon subjects not intrusted to Congress or committed to it by the Constitution. In the *Child Labor Tax Case* (*Bailey vs. Drexel Furniture Co.,* 259 U. S. 20, 37), the court said:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the States. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the

national power, on the other, our country has been able to endure and prosper for nearly a century and a half."

ARTICLE IV OF SECTION 3 OF THE CONSTITUTION

The extremity to which counsel is driven in order to defend the expenditures undertaken by appellant Ickes is no better disclosed than where the appellants rely upon Article IV of Section 3 of the Constitution, empowering Congress to dispose of property of the United States as justifying this expenditure. The power of appropriation of money by Congress cannot be separated from the power of taxation. The theory appellants present, namely, that Congress may levy taxes under the General Welfare Clause and then may do as it pleases with the moneys and dispose of them for purposes for which it could not constitutionally tax the people, is an unconscionable doctrine. Under Article IV, Section 3, Congress has the power to dispose of property of the United States, but that provision certainly was not intended to cover the power of Congress to tax and then to dispose of those funds for non-Federal and unconstitutional purposes.

Story on the Constitution, Vol. 2, Sec. 1327, distinguishes between the appropriation of other revenues of the government and the proceeds from the sale of public lands. The power of Congress over the public lands, of course, is exclusive and absolute.

But the complete answer to this contention of appellants is found in Article 1, Section 9, Clause 7 of the Constitution:

> "No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

What Congress has no power to do directly, it cannot do indirectly by means of the taxing power or other device.

If such a construction is to be permitted, then Congress can become supreme. The Federal Government is no longer one of enumerated powers. Powers reserved to the people and the states will be subject to destruction by Congress.

This case presents a question of power—not of policy.

LEGISLATIVE POWER IS UNCONSTITUTIONALLY DELEGATED BY THE PROVISIONS OF SECTIONS 201, 202 AND 203 OF TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT

Since the decision of the Supreme Court in *Panama Refining Co. vs. Ryan,* decided January 7, 1935, it is unnecessary to discuss the law applicable to the question, but simply to apply that decision to the provisions of the statute in question.

The delegation of power is illegal for the following reasons:

The act gives to the President an unlimited authority to determine the policy and to create the Federal Emergency Administration of Public Works, or not to create it, as he sees fit.

The act contains no definition of the circumstances and conditions under which the President shall exercise his discretionary authority to create, or not to create, the Public Works Administration, and requires no finding by the President in the exercise of his discretionary authority so to create, or not to create the same.

Congress has no power to give to the President an unlimited authority to construct, finance or aid in constructing or financing of any Public Works project included in the program prepared pursuant to Section 202, or not to do so as he thinks fit, or to make or not to make grants or loans to states, municipalities or public bodies for the construction, repair or improvement of any such works as he may in his discretion or the discretion of the Public Works Administrator see fit;

The Act of Congress does not require any finding of the President in the exercise of the discretionary authority to construct, finance or aid in the construction or financing of any such works or the making of any finding as to the terms upon which

grants to states or municipalities or other public bodies may be made;

Congress has established no standard to govern the President's action or the action of the said Administrator and no standards are set up to guide the Administrator in accomplishing the indefinite purpose of increasing employment by the preparation of a public works program;

There is no adequate basis of selection of projects or adequate designation of beneficiaries and no specification of the amount of money to be expended on any project or class thereof.

Congress has no power to appropriate moneys to be expended by the President or by any administrative bureau for any project except as specifically mentioned and described in the act. The development and construction of a Diesel engine generating plant and electric distribution system are not included within the provisions of said sections. If any such power is exercised, or attempted under Section 202 on the theory that the same is granted under the authority to prepare a comprehensive plan of such work, "which shall include among other things the following" and the same are not included therein, such grant of power is invalid.

Congress has no power to appropriate moneys to be expended by either the President or the Administrator by gifts or grants for specified purposes

named in the act without allocation thereof by Congress for particular enterprises or classes thereof, and Congress has no power to authorize the President or the Administrator to spend that money for any purpose which they or either of them may think for the good of the country or the welfare thereof.

A mere statement of these grounds would seem sufficient, and the application of the doctrine of *Panama Refining Company vs. Ryan,* makes it essential to hold this act undertakes an unconstitutional delegation of power.

The provisions of Sections 201, 202 and 203 certainly go much further than Section 9 of Title I, which was held unconstitutional in *Panama Refining Company vs. Ryan.* Can it be that Congress can appropriate billions of dollars and delegate to some officer or administrator the power to determine what electric power developments shall be made within the United States with that money and in his unrestricted discretion to determine what power shall be developed and where, under what terms, how it shall be marketed, the rates to be received for it, and as in a case such as the one at bar, to advance moneys of the United States to a municipality to build a small, local generating plant and distribution system within the city and to control the rates to be charged by such municipality? That is exactly what the appellant Ickes has done. To

show the danger of such unconstitutional delegation of power, one need but read paragraph XXII of the bill of complaint.

Concededly Congress would not have power to enact a law undertaking to regulate such matters within the City of Coeur d'Alene. How then can it delegate such a power to the President or the Administrator?

Paragraph XXII incorporates the statement of the policy adopted by Mr. Ickes in making loans and grants such as the one in this case. It is perfectly evident that it is based solely upon an undertaking on his part to regulate the rates of private utilities and the cost of electric power, and to achieve an object which he considers "socially desirable", namely, cheaper electric light and power rates. His release shows that the loans and grants are not made for any purpose of increasing employment, but solely and only for the purpose of coercing private utility owners into fixing rates which Mr. Ickes considers "socially desirable". As Chief Justice Hughes says in *Panama Refining Company vs. Ryan:*

> 'The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute."

In the brief of counsel for the appellant Ickes, in this court (p. 103) counsel thus undertakes to defend the actions of Mr. Ickes:

> "The Act invests the Administrator, at the direction of the President, with the discretion to finance or not to finance projects according to their judgment of comparative social desirability. Accordingly the Administrator has adopted the policy complained of by the appellee of preferring such municipal electric enterprises as will produce economies to cities over purchased power or provide electric rates lower than those provided by existing utilities if at such lower charges or rates the enterprises are self-liquidating. This test of desirability is within the discretion conferred. As the Act authorized the financing of such municipal enterprises and as the funds available were insufficient to finance all enterprises applying for aid, it has been necessary to apply a reasonable test."

In the brief before Judge Canavah, the same counsel for the Administrator, referring to the release set forth in paragraph XXII of the bill of complaint says:

> "The Administrator has discretion under Sections 202 and 203 to include in the comprehensive program or not to include, to finance or not to finance, state projects. This power to select implies the power to determine the basis of selection. Obviously the said selection among the multitudinous projects of public bodies is a function which requires declarations of policy and rules whereby the selection may be made uniform and not arbitrary. The Congress has committed to the Administrator the power

> to determine the relative social desirability of projects. Exercising that power he has determined that municipal electric projects which do not offer rates lower than existing rates are socially undesirable. This is an administrative function which the courts are not empowered to review."

Thus confessedly the statute is unconstitutional under the decision in *Panama Refining Co. vs. Ryan*. According to counsel's own statement, the act contains no definition of the circumstances and conditions under which these loans and grants may be made, or denied. Certainly it cannot be claimed that this exercise of power on the part of the Administrator consists merely in the making of subordinate rules within prescribed limits. Concededly Congress cannot pass an act declaring that the funds shall be parcelled out to cities and municipalities where the existing utility does not agree to reduce its light and power rates and such loan and grant to cities and municipalities denied where the utility does reduce its rates. How then can the Administrator exercise such power?

THE EXPENDITURE OF PUBLIC MONEYS FOR THE CONSTRUCTION OF THE PLANT IN QUESTION IS NOT AUTHORIZED BY SECTIONS 201, 202 AND 203 OF TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT

Because even if the act is unconstitutional and the powers of the Administrator valid, the defend-

ant Ickes is arbitrarily and unreasonably abusing and exceeding such powers. A discussion of this question involves a policy and conduct of the defendant Ickes violative of the terms of the National Industrial Recovery Act, and also in violation of the Tenth Amendment. Mr. Ickes' policy is one which is not delegated to him by Congress, is clearly for no other purpose than the regulation of light and power rates throughout the United States and part of a policy set up by him beyond anything which can be found within the act and clearly violative of the Tenth Amendment. Judge Cavanah well disposes of the matter in his opinion where he says:

> "It is not seriously urged that under the facts alleged in the bill, an emergency in fact exists or to relieve unemployment or distress in the City of Coeur d'Alene, calling for the making the loan and grant. The bill discloses just the opposite, and one would gather from it that the real purpose of making the loan and grant is to bring about the construction of a utility and to regulate the rates for electricity, for it clearly indicates that the lowering of rates is the primary purpose and object of the national government in offering aid to the city as the Administrator requires of the city to agree to reduce the rates 20 per cent below those now charged by the plaintiff before the loan and grant will be made, and should the plaintiff not reduce its rate to meet the Administrator's approval the loan and grant will be refused. No other reason appears why the loan and grant is being made. Obviously direct control of local utilities operating solely within the state and the regulation of rates is in the

state and beyond the power of the national government."

We may say that even if the powers of the Public Works Administrator under the National Industrial Recovery Act are valid, those powers are being misused for the purpose of regulating the electric rates to be charged in the City of Coeur d'Alene, whether by this plaintiff or by the municipality. In *American Bank & Trust Co. vs. Federal Reserve Bank,* 256 U. S. 350, a petition for an injunction charged that the Reserve Bank purposely accumulated checks upon county banks until they reached a large amount and then presented them over the counter demanding payment in cash for the improper purpose of coercing and intimidating the banks into becoming members of the Federal Reserve System, or at least arranging for clearance of checks at par in accordance with the scheme authorized by the Federal Reserve Act. It was held that the petition stated a cause of action. Therefore, upon the same principle, the acts and policies of the Public Works Adminsitrator are unlawful even if the National Industrial Recovery Act be held constitutional and such acts and policies be held to fall within the terms of that Act.

The complaint alleges (R., p. 68) the Federal Administrator of Public Works in making the loan and grant to Coeur d'Alene for the purposes mentioned in the complaint is undertaking an arbitrary, unreasonable and capricious exercise of delegated authority,

(if indeed it is delegated), in the construction of a small Diesel engine electric generating plant and distribution system in Coeur d'Alene; that the disbursement of public funds of the United States for that purpose does not and will not accomplish or tend to accomplish any of the purposes or objects proposed in the National Industrial Recovery Act; "It does not tend 'to eliminate unfair competitive practices,' but to increase such unfair competitive practices nor 'to promote the fullest possible utilization of the present production capacity of industry,' but rather to discard and render useless much of the productive capacity of plaintiff and similar industries."

It is not seriously urged that it increases or tends to increase employment in Coeur d'Alene, but on the contrary its effect will be actually to reduce employment.

And as has been shown in the complaint and the affidavit of Richard McKay in support of the application for a temporary injunction, the project is so unsound that repayment of the loan is not reasonably secured.

THE TENTH AMENDMENT

The Supreme Court in *Kansas vs. Colorado,* 206 U. S. 46, speaking of the Tenth Amendment says:

> "*This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act.* It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to-wit: 'the people.' Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted." (Italics ours.)

The Federal Government has no power to invade the exclusive powers and functions of the State of Idaho to regulate utilities in the state engaged in intrastate business or to fix and regulate rates and service thereof.

If the National Industrial Recovery Act undertakes any such exercised power, it violates the Tenth Amendment and is unconstitutional, and beyond any power granted the Federal Government under the Constitution.

The acts of the Public Works Administrator are in violation of the terms and provisions of the

National Industrial Recovery Act and a usurpation of power not even granted thereunder.

Tenth Amendment to the Federal Constitution;

Child Labor Tax Case, 259 U. S. 20;

Hammer vs. Dagenhart, 247 U. S. 251;

Hart Coal Corporation vs. Sparks, 7 Fed. Supp. 16;

Kansas vs. Colorado, 206 U. S. 46.

The State of Idaho has exclusive jurisdiction to regulate such rates and services. As to privately-owned utilities, it has exercised that power; as to publicly-owned utilities, it has not exercised the power, but it is reserved in the state.

Congress has no police power as that term is generally understood within the jurisdiction of sovereign states, except over property owned therein by the government in its proprietory capacity.

Hammer vs. Dagenhart, 247 U. S. 251;

Cooley's Constitutional Limitations (8th Ed.) Vol. 1, p. 11;

United States vs. DeWitt, 9 Wall. 41;

Tenth Amendment to the Federal Constitution;

Keller vs. United States, 213 U. S. 138;

Hart Coal Corporation vs. Sparks, 7 Fed. Supp. 16.

The declaration of Mr. Ickes and the telegrams passing between Mr. Ickes and Mr. Post and the telegram and letter forwarded by Mr. Ickes to the City of Coeur d'Alene (set forth in paragraph XXII of the complaint), and the terms of the contract which the appellant municipality and its officers undertook to execute, show that Mr. Ickes in violation of the Constitution, is unlawfully seeking to transcend the powers of a Federal officer and extend his power over matters which are not committed to the Federal Government or its officials.

TITLE II, SECTIONS 201, 202 AND 203 OF THE NATIONAL INDUSTRIAL RECOVERY ACT DOES NOT AUTHORIZE THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS TO MAKE THE LOAN AND GRANT TO THE CITY OF COEUR D'ALENE

Such a project as that proposed by the City of Coeur d'Alene is not within the enumerated works covered or pretended to be covered by the Act. The Act does provide that there shall be included:

> The development of water power.
> The transmission of electric energy.

In the Senate an amendment was adopted, adding "the generation and distribution of electricity." (Senate Amendment No. 44.) That amendment was rejected in conference. 77 Congressional Record,

page 5620. Certainly transmission of electric energy and distribution of electric energy are two separate and distinct things. It is a matter of common engineering knowledge that transmission does not include distribution. Transmission means the carrying of electricity from the place where it is generated to the place where it is to be distributed.

Appellants assert that the construction of a small Diesel engine generating plant and distribution system comes within the term "publicly-owned instrumentalities and facilities." If the argument that such general provision applies, why was it necessary to insert the special words "transmission of electricity"? Apparently it was regarded as essential to include "transmission" and Congress deliberately omitted "distribution". The precise question of including such local generating and distribution systems was proposed, incorporated and finally eliminated from the act.

Without question, the debates in Congress are not appropriate sources of information from which to determine the meaning of a statute passed by that body.

The Supreme Court, however, refers to the fact that it is interesting to note that certain efforts to amend a bill were made and rejected.

Dunlap vs. United States, 173 U. S. 65, 75.

THE COMMERCE CLAUSE

The construction of the proposed electric plant in Coeur d'Alene is purely an intrastate matter.

Utah Power & Light Co. vs. Pfost, 54 Fed. (2) 803, affirmed in the 286 U. S. 165.

The National Industrial Recovery Act construed as affecting intrastate commerce is unconstitutional.

Tenth Amendment to United States Constitution;
Kansas vs. Colorado, 206 U. S. 46, 90, 91;
Hammer vs. Dagenhart, 247 U. S. 251;
Missouri Public Service Co. vs. City of Concordia, supra;
Oliver Iron M. Co. vs. Lord, 262 U. S. 172;
Bailey vs. Drexel Furniture Co., 259 U. S. 20.

It is not seriously urged that the power to make the appropriation and the loan and grant involved in this case can be justified under the Commerce Clause.

NON-FEDERAL GROUNDS

Idaho Constitution Violated

In the opinion of Judge Cavanah the plan for financing the proposed enterprise violates Section 3 of Article VIII of the State Constitution. This is based upon the facts alleged in the complaint that the ordinance as submitted provided only for incurring a liability or indebtedness in the sum of $300,000.00, whereas the plan proposed provides for a plant costing in excess thereof. Judge Cavanah discussing the Idaho Constitution says:

"The scope of the words 'indebtedness or liability,' as employed in the State Constitution, is meant to cover all character of debts and obligations which the city may become bound. The Supreme Court of the state has left no doubt as to its construction of this provision for it has said: 'The Constitution not only prohibits incurring of any indebtedness, but it also prohibits incurring of any liability 'in any manner or for any purpose,' exceeding the yearly income and revenue.' In this connection, it should also be observed that it not merely prohibits incurring any indebtedness or liability exceeding the revenue of the current year, but it also prohibits incurring any indebtedness or liability exceeding the income and revenue provided for such year." (Citing *Feil vs. City of Coeur d'Alene,* 23 Idaho, 32-49 and *Miller vs. City of Buhl,* 38 Ida. 668.)

The Supreme Court in *Feil vs. City of Coeur d'-Alene* and again in *Straughan vs. City of Coeur d'-Alene,* 53 Ida. 494 has held that the term *liability* as used in Section 3 of Article VIII of the Idaho Constitution, is broader than constitutional prohibitions against excessive indebtedness, is more comprehensive and sweeping and means and signifies the state of *being bound or obligated in law or justice to do, pay or make something good;* to cover all kinds and character of debts and obligations for which a city may become bound.

It is sought to avoid the effect of the constitutional limitation upon the municipality by asserting that a portion of the funds to be received by the city represents a gift from the Federal Govern-

ment. If that be true, then the acceptance of any sum in excess of $300,000 constitutes the creation of an illegal, unauthorized liability or indebtedness under the provisions of the Idaho Constitution, and for several reasons.

If the officials of the United States shall give or grant to the City of Coeur d'Alene moneys of the United States and no authority of law exists for such payments, the United States may recover such money.

Bayne vs. United States, 93 U. S. 642;

United States vs. Burchard, 125 U. S. 176;

Wisconsin Central R. vs. United States, 164 U. S. 190.

It is urged by counsel for the appellant Ickes that the United States will be estopped from recovering public funds unconstitutionally and wrongfully diverted to the municipality. He cites but one authority, the decision in *Missouri Utility Co. vs. City of California.* That opinion is not supported either in principal or authority and it is contrary to the decisions which we have above cited. The argument attempts to distinguish the cases which we have cited by saying that the payments involved were made without any statutory authority or under some misconstruction of a statute. That is exactly what we claim is the case here.

At the present term of the Supreme Court in *Wilber National Bank vs. United States,* decided February 4, 1935, the court held that the United States is not bound or estopped by the acts of its officers and agents in entering into an agreement or arrangement to do or cause to be done what the law does not sanction or permit, and that persons dealing with an agent of the United States are charged with notice of the limitation of his authority.

Counsel for the Administrator in the lower court contended that the so-called grant of 30% is not a gift at all but a grant to the city in consideration of the performance of onerous covenants by the city. Among the onerous conditions which the City of Coeur d'Alene is required to agree to in the contract which it has signed in this case are that the city shall adopt a rate and bond ordinance satisfactory to the Administrator in form, sufficiency and substance. It is provided that among other things the ordinance shall provide that no donations, taxes, depreciation charges or any other items of expense, (except normal operating expenses and maintenance, together with extensions), shall be charged against the revenues of the project. The letter of the Public Works Administrator incorporated in the complaint (R., pp. 55-56) shows that the rate ordinance which will meet with the approval of the Administrator must fix rates approximately 20% below existing rates and that the

ordinance shall provide that the rates will be made available and not increased until proved to the satisfaction of the Administrator that the rates are insufficient to provide for operating expenses, improvements, extensions and so much of the debt service as is represented by the proportion which the cost of the electric system bears to the cost of the entire project. It also requires that the ordinance should provide with reference to the rates for street lighting and other municipal service and that it should recite that the agreement of the city to maintain such rates and charges as aforesaid is in further consideration of the grant from the government and is for the benefit of electric consumers and taxpayers of the city. "It will be necessary that the ordinance be approved by the Administrator."

Is not the city under such agreement contracting a liability, or as stated in *Fiel vs. City of Coeur d'Alene,* a "state of being bound or obligated in law or justice to do, pay or make something good." The grant is made in consideration of the agreement. Suppose the city violates the agreement? Will it not be subject to suit by the government for the recovery of the money so advanced as a consideration therefor? Or is it not subject to an action by the government to specifically enforce the contract, to make it *do* something? Does the Federal Government contend that the city may disavow these agreements contained in the contract with impunity?

Counsel for the city go a step further than counsel for Mr. Ickes. They proceed upon the theory "let the lender beware." It is asserted by counsel that an obligation incurred in violation of Section 3 of Article VIII of the Constitution of Idaho is void and unenforceable. Therefore, conceding that the indebtedness is illegal, the city, once it gets the money, is under no obligation to repay the same. In other words, "it is not a debt." This rather unconscionable position amounts in effect to saying that the court should not interfere because after the transaction is consummated, the city may with impunity repudiate it. Under that peculiar doctrine, the Supreme Court of Idaho erroneously decided the cases in which it has enjoined the violation of Section 3 of Article VIII of the Constitution and restrained municipalities from violating the terms thereof. Under the theory presented by counsel for the city, the Supreme Court should have simply held that the borrower should beware, and if he loaned the money, the city would not be injured, but it could repudiate the liability or obligation.

But the Supreme Court of Idaho said that the term "liability" within the constitutional prohibition means the state of being bound or obligated in *law or justice to do, pay or make something good.*

Another reason why the proposed transaction violates this constitutional provision is involved in the purported surrender to the Public Works Ad-

ministrator of the right to determine what rates the city shall charge for electricity, as well as the provisions required in the rate ordinance with reference to the use of funds received from light and power sales.

As we have pointed out elsewhere this attempted exercise of power by the Public Works Administrator violates the Tenth Amendment. The whole performance is illegal in that the officials of the city by accepting the conditions of the contract undertook the unwarranted and unlawful surrender of police power now vested in the city itself but primarily vested in the State of Idaho.

> *McQuillan on Municipal Corporations,* 2nd Ed., Vol. 3, p. 57 and cases there cited.

The Supreme Court of the United States has announced the rule as follows:

> "The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."
>
> *Northern Pacific Ry. Co. vs. Minn. ex rel Duluth,* 208 U. S. 583;
>
> *Boston Beer Co. vs. Mass.,* 97 U. S. 25.

In Idaho, the power at this time to regulate rates of municipal utilities is committed to the municipal government. However, the power to regulate these rates is in the legislature, and it may commit that power to the Public Utilities Commission if it desires.

Assuming that the contract is legal and valid and the grant and loan is made and the city, in violation of the agreement, declines to pass a rate ordinance which is satisfactory to the Administrator, or thereafter without his consent, changes the rates, could not the United States recover the money so paid for breach of the contract by the city?

But in addition to this, the contract undertakes to provide what the rate ordinance shall contain and among other things provides that no depreciation charges shall be charged against the revenues of the project. Section 49-1132, Idaho Code, Ann. 1932, provides:

> "In fixing said charges, rates or revenues, said municipal corporation shall have the right to take into consideration and include, in addition to all of its other expenses and costs incurred in the operation of said plants, any or all of the following items; any interest on any bonded or other indebtedness created in order to acquire, construct, enlarge, extend, repair, alter and improve such plants, or any of them; a sinking fund to meet said indebtedness; and a fund to meet and provide for any depreciation on said plants, and to provide for extensions or equipment necessary to meet the needs of the community served."

Among the items so included is depreciation. Under the contract which has been signed by the city and pursuant to the ordinance passed on the 23rd of November, 1934, the city officials agree that depreciation shall not be charged. Are they not there undertaking a liability in consideration of

the grant from the United States which in justice their successors should live up to, but which they are not bound to because the controlling statute gives them the power to make such depreciation charges?

The Effect of Omitting Part of the City

The report of the engineer employed by the city prior to the bond election to outline a plan for the construction of a municipal distribution system purported to show the cost of a complete generating plant and distribution system for the city (Complaint, par. XIII). The ordinance (Ex. A., R., pp. 77 to 83) in its title shows that it provides for the incurring of an indebtedness for paying the costs and expenses of the acquisition by purchase or by construction thereof of a light and power plant for said city, and Section No. 1 of the ordinance contains the same statement. There is nothing in the ordinance indicating that anything is planned other than a complete distribution system.

The campaign conducted by the defendant city and its officers led the people to believe that the matter submitted to a vote was whether or not a system should be acquired or constructed for the service of the entire city. The Chairman of the Fire, Light and Water Committee of the city published a letter (R., pp. 149 to 155) in which he stated that it was the intention of the city to build a much larger and better designed electric distribution system (compared to the existing system) and that the

city intended "to connect up all porch lights on the city side of the meter so that each resident can have a porch light all night." The fact is that two sections of the city were not included within the distribution system planned and the report of the engineer failed to provide service therefor. In the districts omitted, the appellee is now serving 155 customers (Comp., p. 32) and in other disconnected areas in the city, for which service is not provided, an additional 25 customers are served.

These facts were concealed from the voters and the conduct of the city is defended by it and its officers on the ground that the validity of an election cannot be assailed because of false, misleading or erroneous statements put out by the defendants. No argument is presented or authority cited supporting the assertion that a municipality and its officers can submit such an issue to the voters and conceal a material fact such as in this case, and then the same municipality and the same officers contend that their action cannot be assailed because of such concealment.

The grant of authority to a municipality to acquire by purchase or otherwise a light and power plant by the issuance of bonds requires that the

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*49-2405. *Light and Power Plants.* Every municipal corporation incorporated under the laws of the territory of Idaho or the State of Idaho, shall have power and authority to issue municipal coupon bonds, in a sufficient amount to acquire, by purchase or otherwise, a light

ordinance shall specify and state the amount and *purpose* of such proposed bond issue. Sections 49-2405 and 49-2411, Idaho Code, Ann.*

The ordinance in this case certainly does not contemplate or authorize an indebtedness for anything less than a power plant and distribution system for the serving of the entire city and does not contemplate or authorize the indebtedness for the construction of a plant for a part of the city only.

Combining the Proceeds of Municipal Bonds Authorized for Two Separate Enterprises into One Project, is Unlawful

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and power plant for such municipal corporation, and to construct, enlarge, extend, repair, alter and improve such plant.

"The amount for which bonds may be issued for acquiring light and power plants or either, for the purpose of construction, enlargement, extension, repairing, alteration and improvement of an existing plant or for any, or either of said purposes as herein provided, shall be determined by the council or board of trustees and stated in the ordinance therefor. The issuance of bonds for the purpose aforesaid or any of such purposes, shall be authorized as provided in Section 49-2411, and one or more bond elections may be called in the manner as provided in said statute or amendatory act, in order to submit to the qualified electors who are taxpayers, the question as to whether bonds shall issue in such amount as the city council or board of trustees, at the time any such election is called, shall deem to be necessary for the purposes aforesaid or any or either of them."

The loan and grant agreement between the city and the Public Works Administrator (Ex. D) and the ordinance approving the same (Ex. C) discloses that defendants propose that the government shall finance one project consisting of a water system and a Diesel engine generating plant and electric distribution system. The two municipal projects are handled as one. The contract does not separate the amount which is to be charged to the one, the amount charged to the other, or the amount of the grant or gift which is to be credited to the one or the other. The bonds are not separately sold

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"49-2411. *City and Village Bonds—Ordinance—Election.* Whenever the common council or the trustees of a municipal corporation, or other legislative body of any municipal corporation, shall deem it advisable to issue the coupon bonds of such municipal corporation for any of the purposes aforesaid, the mayor and common council or the trustees of such municipal corporation shall provide therefor by ordinance, which shall specify and state and set forth all the purposes, objects, matters and things required by Section 3 of the 'Municipal Bond Law' of the State of Idaho (Sec. 55-203, Idaho Code) and make provision for the collection of an annual tax sufficient to pay the interest on such proposed bonds as it falls due and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same as required by the constitution and law of Idaho.

"The ordinance shall provide for the holding of an election of the qualified electors who are taxpayers of such municipal corporation,

and the entire project is treated as a single unit. No provision is made as to the bonds under each issue which are to mature during the several years. No distinction is made between the bonds issued for the water system and the bonds for the light and power plant. The bond ordinance and the election authorized an expenditure or indebtedness of $300,000 for a generating and light distribution system, and the other ordinance $300,000 for a water system. No authority is found for the issuance of bonds of $504,000, nor is there any authority for

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of which thirty days' notice, to be provided for in such ordinance, shall be given in a newspaper printed and published in such municipal corporation, but if no newspaper be printed and published in the municipal corporation, then in some newspaper having general circulation therein; such newspaper to be designated in said ordinance. Such election shall be conducted as other municipal elections. The voting at such elections must be by ballot, and the ballot used shall be substantially as follows: 'In favor of issuing bonds to the amount of_____dollars for the purpose stated in ordinance No. _____,' and 'Against issuing bonds to the amount of_____dollars for the purpose stated in ordinance No. _____.' If at such election held as provided for in this chapter, two-thirds of the qualified electors who are taxpayers in such municipal corporation, voting at such election, assent to the issuing of such bonds and the incurring of the indebtedness thereby created for the purpose aforesaid, such bonds for said purpose shall be issued in the manner provided by said 'Municipal Bond Law' of the State of Idaho."

combining the same. No provisions are found for the keeping of separate accounts in the two enterprises or for limiting the expenditure in each within the expenditure authorized by the voters. The attempted arrangement is in violation of Sections 55-203, 55-204 and 55-212 of the Idaho Codes Ann. Those provisions of the Idaho Code are as follows:

"Section 55-203. *Authorization of Bonds.*—

Whenever the governing board of any such corporation shall deem it advisable to issue the negotiable coupon bonds thereof for any authorized purpose, such governing board shall provide therefor by ordinance or resolution, duly passed and adopted and spread at length on the permanent record of its proceedings, which ordinance or resolution shall specify and state the amount and purpose of such proposed bond issue, the ultimate maturity of such bond issue, and that the annual bond maturities thereof shall be amortized and payable in accordance with the provisions of this act."

"Section 55-204. *Bonds—Form and Recitals.*—

Each bond shall be numbered consecutively and shall be payable and paid to bearer, in numerical order, lowest numbers first, and shall state and recite upon the face thereof the purpose for which the same is issued, the principal amount thereof, rate of interest thereon, date of issue, time and place or places of payment, and that it is issued in conformity with and after full compliance with the constitution of Idaho and this act and all other laws applicable thereto, and that the full faith, credit and all taxable property within the issuing corporation are and shall continue pledged for and until the full payment of the principal and interest thereof; and there may be set forth

upon the face of said bonds such other statements and recitals as are customary and not prohibited by law."

"Section 55-212. *Bonds for Each Purpose a Distinct Series.*—

All bonds authorized by the vote of the electors upon a distinct proposition submitted unto them or authorized by any governing board where no popular election is required by law and for one purpose, shall constitute a distinct series, the bonds of which may be issued by any such governing board in separate issues, if deemed by such governing board to be to the best interest of the issuer so to do. The bonds of each series and of each of the issues thereunder shall be distinguished upon the face of each of such bonds by some distinguishing numbers or letters or descriptive language as may be determined by any such governing board; and the bonds of each such issue shall be numbered from one upwards consecutively."

From these sections, it will be seen that the city has no power to contract jointly with reference to these separate issues. The law requires that neither project shall result in an indebtedness or liability in excess of the amount authorized; that in case a less amount shall be sufficient for either of said projects, the bond indebtedness of that issue shall be reduced to the extent thereof. Under the plan proposed, it would be tempting, easy and undoubtedly would result in the use of funds from one authorized issue to construct the plant of the other. This contract and ordinance violates not only the letter, but the spirit of the statute.

THE ORDER GRANTING THE INJUNCTION MUST BE AFFIRMED UNDER THE TERMS OF THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935

The Emergency Relief Appropriation Act of 1935 approved April 8, 1935, Public Resolution—No. 11—74th Congress, provides among other things:

> "* * * this appropriation shall be available for the following classes of projects, and the amounts to be used for each class shall not, except as hereinafter provided, exceed the respective amounts stated, namely: * * *
>
> (g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisons and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000."

The purpose of the amendment was to limit projects for which loans and grants can be made to those where not less than 25% of the loan or grant, or the aggregate thereof, is to be expended for work upon such particular project.

In this case, the bill shows that only $29,000 is to be expended for labor in the construction and installation of the Diesel engine power plant and

electric distribution system plus a share of the expenditure of $6,900 for labor for a building to house the engine and also to house the pumps for a water system.

In *Ely vs. Northern Pacific Railway Co.,* 197 U. S. 1, the Supreme Court held that an act of Congress passed even after the decision in a particular case in the lower court and which affects the merits of that case, will be controlling upon the Supreme Court and may be called to its attention by brief.

GRANTING OF TEMPORARY INJUNCTION A MATTER OF DISCRETION

The question of granting a temporary injunction pending the decision in this case was one which rested in the sound discretion of the trial court and its decision should not be reviewed unless it appears that that legal discretion was improvidently exercised.

Idaho-State Mining & Dev. Co. vs. Bunker Hill & Sullivan M. & C. Co., 121 Fed. 973.

Respectfully submitted,

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No. 7773

In the United States Circuit Court of Appeals for the Ninth Circuit

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. MCEUEN AND C. C. HODGE, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

APPENDIX TO BRIEF OF APPELLEE

The General Welfare Clause as interpreted by the Presidents and Certain Writers on the Constitution.

JOHN P. GRAY,
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SHAW & BOWDEN CO. 255730

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7773

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. MCEUEN AND C. C. HODGE, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

APPENDIX TO BRIEF OF APPELLEE

We are including herein statements of authority to which we have referred in the brief, showing the executive construction given to the General Welfare Clause and quotations from authorities with respect thereto:

JEFFERSON

Jefferson's opinion on the Bank of the United States, contains the following statement:

> "To lay taxes to provide for the general welfare of the United States is to lay taxes *for the purpose* of providing for the general welfare. For the laying of taxes is the *power,* and the general welfare the *purpose,* for which the power is to be exercised. Congress are not to lay taxes *ad libitum,* for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phase not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phase, that of instituting a congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give that which will allow some meaning to the other parts of the instrument, and not that which will render all the others useless. Certainly,

no such universal power was meant to be given them. It was intended to lace them up strictly within the enumerated powers, and those without which, as means, those powers could not be carried into effect."

Writings of Thomas Jefferson, Library Edition, 1903, Vol. III, p. 148; also

Story on the Constitution, Sec. 926.

In his Sixth Annual Message of December 2, 1806, Jefferson again recognizes the Madison interpretation is the correct one. He says:

"Their patriotism would certainly prefer its continuance and application to the great purposes of the public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of Federal powers. By these operations new channels of communication will be opened between the States, the lines of separation will disappear, their interests will be identified and their union cemented by new and indissoluble ties. Education is here placed among the articles of public care, not that it would be proposed to take its ordinary branches out of the hands of private enterprise, which manages so much better all the concerns to which it is equal, but a public institution can alone supply those sciences which though rarley called for are yet necessary to complete the circle, all the parts of which contribute to the improvement of the country and some of them to its preservation. The subject is now proposed for the consideration of Congress, because if approved by the time the State legislatures shall have deliberated on this extension of the Federal trusts, and the laws shall be passed and other arrangements made

for their execution, the necessary funds will be on hand and without employment. I suppose an amendment to the Constitution, by consent of the States, necessary, because the objects now recommended are not among those enumerated in th Constitution, and to which it permits the public moneys to be applied.

"The present consideration of a national establishment for education particularly is rendered proper by this circumstance also, that if Congress approving the proposition, shall yet think it more eligible to found it on a donation of lands, they have it now in their power to endow it with those which will be among the earliest to produce the necessary income."

Messages and Papers of the Presidents, Vol. 1, pp. 409-410.

MADISON

Madison's Veto Message of March 3, 1817, Messages and Papers of the Presidents, Vol. 1, pp. 584, 585. In this message it is said:

"The legislative powers vested in Congress are specified and enumerated in the eighth section of th first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers, or that it falls by and just interpretation within the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States. * * *

"To refer the power in question to the clause 'to provide for the common defense and general welfare' would be contrary to the

established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper. Such view of the Constitution would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms 'common defense and general welfare' embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Constitution and laws of the several States in all cases not specifically exempted to be superseded by laws of Congress, it being expressly declared 'that the Constitution of the United States and laws made in pursuance thereof shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.' Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.

"A restriction of the power 'to provide for the common defense and general welfare' to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution.

> "If a general power to construct roads and canals, and to improve the navigation of water courses, with the train of powers incident thereto, be not possessed by Congress, the assent of the States in the mode provided in the bill cannot confer the power. The only cases in which the consent and cession of particular States can extend the power of Congress are those specified and provided for in the Constitution."

He suggests that an amendment might give such power to the Federal Government.

Madison's letter to Andrew Stevenson contains a complete statement of his views with reference to the General Welfare Clause. It is printed in Vol. IX, p. 411, Writings of Madison, Hunt Edition, also Madison's Works, published by Order of Congress, Vol. IV, p. 121. It is as follows:

> "To Andrew Stevenson. Mad. Mss.
>
> Montpr., Novr. 27, 1830.
>
> Dr. Sir. I have recd. your very friendly favor of the 20th instant, referring to a conversation when I had lately the pleasure of a visit from you, in which you mentioned your belief that the terms 'common defence & general welfare' in the 8th section of the first article of the Constitution of the U. S. were still regarded by some as conveying to Congress a substantive & indefinite power, and in which I communicated my views of the introduction and occasion of the terms, as precluding that comment on them, and you express a wish that I would repeat those views in the answer to your letter.

However disinclined to the discussion of such topics at a time when it is so difficult to separate in the minds of many, questions purely constitutional from the party polemics of the day, I yield to the precedents which you think I have imposed on myself, & to the consideration that without relying on my personal recollections, which your partiality over-values, I shall derive my construction of the passage in question from sources of information & evidence known or accessible to all who feel the importance of the subject, and are disposed to give it a patient examination.

In tracing the history & determining the import of the terms 'common defence & general welfare' as found in the text of the Constitution, the following lights are furnished by the printed Journal of the Convention which formed it:

The terms appear in the general propositions offered May 29, as a basis for the incipient deliberations, the first of which 'Resolved that the articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution, namely, common defence, security of liberty and general welfare.' On the day following, the proposition was exchanged for 'Resolved that a Union of the States merely Federal will not accomplish the objects proposed by the Articles of Confederation, namely, common defence, security of liberty and general welfare.'

The inference from the use here made of the terms & from the proceedings on the subsequent propositions is, that altho common defence & general welfare were objects of the Confederation, they were limited objects, which ought to be enlarged by an enlargement of the particular

powers to which they were limited, and to be accomplished by a change in the structure of the Union from a form merely Federal to one partly national; and as these general terms are prefixed in the like relation to the several legislative powers in the new charter, as they were in the old, they must be understood to be under like limitations in the new as in the old.

In the course of the proceedings between the 30th of May and the 6th. of Augt., the terms common defence & general welfare, as well as other equivalent terms, must have been dropped; for they do not appear in the Draft of a Constitution, reported on that day by a committee appointed to prepare one in detail, the clause in which those terms were afterward inserted, being in the Draft simply, 'The Legislature of the U. S. shall have power to lay & collect taxes, duties, imposts, & excises.'

The manner in which the terms became transplanted from the old into the new system of Government, is explained by a course somewhat adventitiously given to the proceedings of the Convention.

On the 18th. of Augst. among other propositions referred to the committee which had reported the draft, was one 'to *secure* the payment of the public debt' and

On the same day was appointed a committee of eleven members, (one from each State) 'to consider the necessity & expediency of *the debts of the several States,* being assumed by the U. States.'

On the 21st. of Augst. this last committee reported a clause in the words following: 'The Legislature of the U. States *shall have power*

to fulfil the engagements *which have been* entered into by Congress, and to discharge as well the debts of the U. States, as the debts incurred by the *several* States *during the late war,* for the *common defence* and *general welfare;* conforming herein to the 8th of the Articles of Confederation the language of which is, that 'all charges of war, and all other expenses that shall be incurred for the common defence and general welfare, and allowed by the U. S. in Congress assembled, shall be defrayed out of a common Treasury' &c.

On the 22d. of Augst. the committee of five reported among other additions to the clause *giving power* 'to lay and collect taxes imposts & excises,' a clause in the words following, 'for payment of the debts and necessary expenses,' with a proviso qualifying the duration of Revenue laws.

This Report being take up, it was moved, as an amendment, that the clause should read, 'The Legislature *shall* fulfill the engagements and discharge the debts of the U. States.'

It was then moved to strike out 'discharge the debts,' and insert, 'liquidate the claims,' which being rejected, the amendment was agreed to as proposed, viz.: 'The Legislature *shall* fulfil the engagements and discharge the debts of the United States.'

On the 23d. of Augst. the clause was made to read 'The legislature shall fulfil the engagements and discharge the debts of the U. States, and shall have the power to lay & collect taxes imposts & excises' the two powers relating to taxes & debts being merely transposed.

On the 25th. of August the clause was again altered so as to read 'All debts contracted and engagements entered into by or under the authority of Congress, (the Revolutionary Congress) shall be as valid under this constitution as under the Confederation.'

This amendment was followed by a proposition referring to the powers to lay & collect taxes, &c. and to discharge the (*old* debts) to add, 'for payment of *said* debts, and for defraying the *expenses that shall be* incurred *for the common defence and general welfare.*' The proposition was disagreed to, one State only voting for it.

Sept. 4. The committee of eleven reported the following modification—'The Legislature shall have power to lay & collect taxes duties imposts and excises, to pay the debts and provide for the common defence & general welfare;' thus retaining the terms of the Articles of Confederation, & covering by the general term 'debts,' those of the old Congress.

A special provision in this mode could not have been necessary for the debts of the new Congress: For a power to provide money, and a power to perform certain acts of which money is the ordinary & appropriate means, must of course carry with them a power to pay the expense of performing the acts. Nor was any special provision for debts proposed, till the case of the Revolutionary debts was brought into view; and it is a fair presumption from the course of the varied propositions which have been noticed, that but for the old debts, and their association with the terms 'common defence & general welfare,' the clause would have remained as reported in the first draft of a Constitution, expressing generally,

'a power in Congress to lay and collect taxes, duties, imposts & excises,' without any addition of the phrase, 'to provide for the common defence & general welfare.' With this addition, indeed, the language of the clause being in conformity with that of the clause in the Articles of Confederation, it would be qualified, as in those articles, by the specification of powers subjoined to it. But there is sufficient reason to suppose that the terms in question would not have geen introduced but for the introduction of the old debts, with which they happened to stand in a familiar tho' inoperative relation. Thus introduced, however, they passed undisturbed thro' the subsequent stages of the Constitution.

If it be asked why the terms 'common defence & general welfare,' if not meant to convey the comprehensive power which taken literally they express, were not qualified & explained by some reference to the particular powers subjoind, the answer is at hand, that altho' it might easily have been done, and experience shows it might be well if it had been done, yet the omission is accounted for by an inattention to the phraseology, occasioned, doubtless, by its identity with the harmless character attached to it in the instrument from which it was borrowed.

But may it not be asked with infinitely more propriety, and without the possibility of a satisfactory answer, why, if the terms were meant to embrace not only all the powers particularly expressed, but the indefinite power which has been claimed under them, the intention was not so declared; why, on that supposition, so much critical labor was employed in enumerating the particular powers, and in defining and limiting their extent?

The variations & vicissitudes in the modification of the clause in which the terms 'common defence & general welfare' appear, are remarkable, and to be not otherwise explaind than by differences of opinion concerning the necessity or the form of a constitutional provision for the debts of the Revolution; some of the members apprehending improper claims for losses, by depreciated emissions of bills of credit; others an evasion of proper claims if not positively brought within the authorized functions of the new Govt., and others again considering the past debts of the U. States as sufficiently secured by the principle that no change in the Govt. could change the obligations of the nation. Besides the indications in the Journal, the history of the period sanctions this explanation.

But it is to be emphatically remarked, that in the multitude of motions, propositions, and amendments, there is not a single one having reference to the terms 'common defence & general welfare' unless we were so to understand the proposition containing them made on Aug. 25, which was disagreed to by all the States except one.

The obvious conclusion to which we are brought is, that these terms copied from the Articles of Confederation, were regarded in the new as in the old instrument, merely as general terms explained & limited by the subjoined specifications; and therefore requiring no critical attention or studied precaution.

If the *practice* of the Revolutionary Congress be pleaded in opposition to this view of the case, the plea is met by the notoriety that on several accounts the practice of that Body is

not the expositor of the 'Articles of Confederation.' These articles were not in force till they were finally ratified by Maryland in 1781. Prior to that event, the power of Congress was measured by the exigencies of the war, and derived its sanction from the acquiescence of the States. After that event, habit and a continued expediency, amounting often to a real or apparent necessity, prolonged the exercise of an undefined authority; which was the more readily overlooked, as the members of the body held their seats during pleasure, as its acts, particularly after the failure of the Bills of Credit, depended for their efficacy on the will of the States; and as its general impotency became manifest. Examples of departure from the prescribed rule, are too well known to require proof. The case of the old Bank of N. America might be cited as a memorable one. The incorating ordinance grew out of the inferred necessity of such an Institution to carry on the war, by aiding the finances which were starving under the neglect or inability of the States to furnish their assessed quotas. Congress was at the time so much aware of the deficient authority, that they recommended it to the State Legislatures to pass laws giving due effect to the ordinance; which was done by Pennsylvania and several other States. In a little time, however, so much dissatisfaction arose in Pennsylvania, where the bank was located, that it was proposed to repeal the law of the State in support of it. This brought on attempts to vindicate the adequacy of the power of Congress to incorporate such an Institution. Mr. Wilson, justly distinguished for his intellectual powers, being deeply impressed with the importance of a bank at such a crisis, published a small pamphlet entitled 'Considerations on the Bank of N. America,' in which he endeavored

to derive the power from the *nature* of the union in which the Colonies were declared & became independent States, and also from the tenor of the 'Articles of Confederation' themselves. But what is particularly worthy of notice is, that with all his anxious search in those articles for such a power he never glanced at the terms 'common defence & general welfare' as a source of it. He rather chose to rest the claim on a recital in the text, 'that for the more convenient management of the *general* interests of the *United* States, Delegates shall be annually appointed to meet in Congress, which, he said, implied that the *United* States had *general* rights, *general* powers, and *general* obligations, not derived from *any* particular State, nor from *all* the particular States taken separately, but resulting from the *union* of the whole,' these general powers not being controlled by the Article declaring that each State retained *all* powers not granted by the articles, because 'the *individual* States *never* possessed & could not retain a *general* power over the others.'

The authority & argument here resorted to, if proving the ingenuity & patriotic anxiety of the author on one hand, show sufficiently on the other, that the terms common defence and general welfare cd. not, according to the known acceptation of them, avail his object.

That the terms in question were not suspected in the Convention which formed the Constitution of any such meaning as has been constructively applied to them may be pronounced with entire confidence. For it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant & cautious definition of Federal powers, should

have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions & definitions elaborated by them.

Consider for a moment the immeasurable difference between the Constitution limited in its powers to the enumerated objects; and expounded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two Constitutions, of characters essentially contrasted with each other, the one possessing powers confined to certain specified cases, the other extended to all cases whatsoever; for what is the case that would not be embraced by a general power to raise money, a power to provide for the general welfare, and a power to pass all laws necessary & proper to carry these powers into execution; all such provisions and laws superseding at the same time, all local laws & constitutions at variance with them. Can less be said, with the evidence before us furnished by the Journal of the Convention itself, than that it is impossible that such a Constitution as the latter would have been recommended to the States by all the members of that Body whose names were subscribed to the instrument.

Passing from this view of the sense in which the terms common defence & general welfare were used by the Framers of the Constitution, let us look for that in which they must have been understood by the Conventions, or rather by the people, who thro' their Conventions, accepted & ratified it. And here the evidence is if possible still more irresistible, that the terms could not have been regarded as giving a scope to federal legislation, infinitely more objectionable than any of the specified powers which

produced such strenuous opposition, and calls for amendments which might be safeguards against the dangers apprehended from them.

Without recurring to the published debates of those Conventions, which, as far as they can be relied on for accuracy, would it is believed not impair the evidence furnished by their recorded proceedings, it will suffice to consult the list of amendments proposed by such of the Conventions as considered the powers granted to the new Government too extensive or not safely defined.

Besides the restrictive & explanatory amendments to the text of the Constitution it may be observed, that a long list was premised under the name and in the nature of 'Declarations of Rights;' all of them indicating a jealousy of the federal powers, and an anxiety to multiply securities against a constructive enlargement of them. But the appeal is more particularly made to the number & nature of the amendments proposed to be made specific & integral parts of the Constitutional text.

No less than seven States, it appears, concurred in adding to their ratifications a series of amendments wch. they deemed requisite. Of these amendments, *nine* were proposed by the Convention of Massachusetts, *five* by that of S. Carolina, *twelve* by that of N. Hampshire, *twenty* by that of Virginia, *thirty-three* by that of N. York, *twenty-six* by that of N. Carolina, *twenty-one* by that of R. Island.

Here are a majority of the States, proposing amendments, in one instance thirty-three by a single State; all of them intended to circumscribe the powers granted to the General

Government, by explanations, restrictions or prohibitions, without including a single proposition from a single State referring to the terms common defence & general welfare; which if understood to convey the asserted power, could not have failed to be the power most strenuously aimed at, because evidently more alarming in its range, than all the powers objected to put together; and that the terms should have passed altogether unnoticed by the many eyes wch. saw danger in terms & phrases employed in some of the most minute & limited of the enumerated powers, must be regarded as a demonstration, that it was taken for granted that the terms were harmless, because explained & limited as in the 'Articles of Confederation,' by the enumerated powers which followed them.

A like demonstration, that these terms were not understood in any sense that could invest Congress with powers not otherwise bestowed by the constitutional charter, may be found in what passed in the first session of the first Congress, when the subject of amendments was taken up, with the conciliatory view of freeing the Constitution from objections which had been made to the extent of its powers, or to the unguarded terms employed in describing them. Not only were the terms 'common defence and general welfare' unnoticed in the long list of amendments brought forward in the outset; but the Journals of Congs. show that, in the progress of the discussions, not a single proposition was made in either branch of the Legislature which referred to the phrase as admitting a constructive enlargement of the granted powers, and requiring an amendment guarding against it. Such a forebearance & silence on such an occasion, and among so many members who belonged to the part of the nation which

called for explanatory & restrictive amendments, and who had been elected as known advocates for them, cannot be accounted for without supposing that the terms 'common defence & general welfare' were not at that time deemed susceptible of any such construction as has since been applied to them.

It may be thought, perhaps, due to the subject, to advert to a letter of Octr. 5, 1787, to Samuel Adams, and another of Oct. 16 of the same year to the Governor of Virginia, from R. H. Lee, in both which it is seen that the terms had attracted his notice, and were apprehended by him 'to submit to Congress every object of human Legislation.' But it is particularly worthy of Remark, that, although a member of the Senate of the U. States, when amendments of the Constitution were before that house, and sundry additions & alterations were there made to the list sent from the other, no notice was taken of these terms as pregnant with danger. It must be inferred that the opinion formed by the distinguished member at the first view of the Constitution, & before it had been fully discussed & elucidated, had been changed into a conviction that the terms did not fairly admit the construction he had originally put on them, and therefore needed no explanatory precaution agst. it.

Allow me, my dear sir, to express on this occasion, what I always feel, an anxious hope that as our Constitution rests on a middle ground between a form wholly national and one merely federal, and on a division of the powers of the Govt. between the States in their united character and in their individual character, this peculiarity of the system will be kept in view, as a key to the sound interpreta-

tion of the instrument, and a warning agst. any doctrine that would either enable the States to invalidate the powers of the U. States, or confer all power on them.

I close these remarks which I fear may be found tedious with assurances of my great esteem, and best regards."

"Supplement to the letter of November 27, 1830, to A. Stevenson, on the phrase 'common defence and general welfare.'—On the power of indefinite appropriation of money by Congress.

It is not to be forgotten, that a distinction has been introduced between a power merely to appropriate money to the common defence & general welfare, and a power to emplow all the means of gving full effect to objects embraced by the terms.

1. The first observation to be here made is, that an *express* power to appropriate money authorized to be raised, to objects authorized to be provided for, could not, as seems to have been supposed, be at all necessary; and that the insertion of the power 'to pay the debts,' &c., is not to be referred to that cause. It has been seen, that the particular expression of the power originated in a cautious regard to debts of the United States antecedent to the radical change in the Federal Government; and that, but for that consideration, no particular expression of an appropriating power would probably have been thought of. An express power to raise money, and an express power (for example) to raise an army, would surely imply a power to use the money for that purpose. And if a doubt could possibly arise

as to the implication, it would be completely removed by the express power to pass all laws necessary and proper in such cases.

2. But admitting the distinction as alleged, the appropriating power to all objects of 'common defence and general welfare' is itself of sufficient magnitude to render the preceding views of the subject applicable to it. Is it credible that such a power would have been unnoticed and unopposed in the Federal Convention? in the State Conventions, which contended for, and proposed restrictive and explanatory amendments? and in the Congress of 1789, which recommended so many of these amendments? A power to impose *unlimited taxes* for *unlimited purposes* could never have escaped the sagacity and jealousy which were awakened to the many inferior and minute powers which were criticised and combated in those public bodies.

3. A power to appropriate money, without a power to apply it in execution of the object of appropriation, could have no effect but to lock it up from public use altogether; and if the appropriating power carries with it the power of application and execution, the distinction vanishes. The power, therefore, means nothing, or what is worse than nothing, or it is the same thing with the sweeping power 'to provide for the common defence and general welfare.'

4. To avoid this dilemma, the consent of the States is introduced as justifying the exercise of the power in the full extent within their respective limits. But it would be a new doctrine, that an extra-constitutional consent of the parties to a Constitution could amplify the

jurisdiction of the constituted Government. And if this could not be done by the concurring consents of all the States, what is to be said of the doctrine that the consent of an individual State could authorize the application of money belonging to all the States to its individual purposes? Whatever be the presumption that the Government of the whole would not abuse such an authority by a partiality in expending the public treasure, it is not the less necessary to prove the existence of the power. The Constitution is a limited one, possessing no power not actually given, and carrying on the face of it a distrust of power beyond the distrust indicated by the ordinary forms of free Government.

The peculiar structure of the Government, which combines an equal representation of unequal numbers in one branch of the Legislature, with an equal representation of equal numbers in the other, and the peculiarity which invests the Government with selected powers only, not intrusting it even with every power withdrawn from the local governments, prove not only an apprehension of abuse from ambition or corruption in those administering the Government, but of oppression or injustice from the separate interests or views of the constituent bodies themselves, taking effect through the administration of the Government. These peculiarities were thought to be safeguards due to minorities having peculiar interests or institutions at stake, against majorities who might be tempted by interest or other motives to invade them; and all such minorities, however composed, act with consistency in opposing a latitude of construction, particularly that which has been applied to the terms 'common defence and general welfare,'

which would impair the security intended for minor parties. Whether the distrustful precaution interwoven in the Constitution was or was not in every instance necessary; or how far, with certain modifications, any farther powers might be safely and usefully granted, are questions which were open for those who framed the great Federal Charter, and are still open to those who aim at improving it. But while it remains as it is its true import ought to be faithfully observed; and those who have most to fear from constructive innovations ought to be most vigilant in making head against them.

But it would seem that a resort to the consent of the State Legislatures, as a sanction to the appropriating power, is so far from being admissible in this case, that it is precluded by the fact that the Constitution has expressly provided for the cases where that consent was to sanction and extend the power of the national Legislature. How can it be imagined that the Constitution, when pointing out the cases where such an effect was to be produced, should have deemed it necessary to be positive and precise with respect to such minute spots as forts, &c., and have left the general effect ascribed to such consent to an argumentative, or, rather, to an arbitrary construction? And here again an appeal may be made to the incredibility that such a mode of enlarging the sphere of federal legislation should have been unnoticed in the ordeals through which the Constitution passed, by those who were alarmed at many of its powers bearing no comparison with that source of power in point of importance.

5. Put the case that money is appropriated to a canal to be cut within a particular State; how and by whom, it may be asked, is the

money to be applied and the work to be executed? By agents under the authority of the General Government? then the power is no longer a mere appropriating power. By agents under the authority of the States? then the State becomes either a branch or a functionary of the Executive authority of the United States; an incongruity that speaks for itself.

6. The distinction between a pecuniary power only, and a plenary power 'to provide for the common defence and general welfare,' is frustrated by another reply to which it is liable. For if the clause be not a mere introduction to the enumerated powers, and restricted to them, the power to provide for the common defence and general welfare stands as a distinct substantive power, the first on the list of legislative powers; and not only involving all the powers incident to its execution, but coming within the purview of the clause concluding the list, which expressly declares that Congress may make all laws necessary and proper to carry into execution the *foregoing* powers vested in Congress.

The result of this investigation is, that the terms 'common defence and general welfare' owed their induction into the text of the Constitution to their connexion in the 'Articles of Confederation,' from which they were copied, with the debts contracted by the old Congress, and to be provided for by the new Congress; and are used in the one instrument as in the other, as general terms, limited and explained by the particular clauses subjoined to the clause containing them; that in this light they were viewed throughout the recorded proceedings of the Convention which framed the Constitution; that the same was the light in which they were viewed by the State Conventions

which ratified the Constitution, as is shown by the records of their proceedings; and that such was the case also in the first Congress under the Constitution, according to the evidence of their journals, when digesting the amendments afterward made to the Constitution. It equally appears that the alleged power to appropriate money to the 'common defence and general welfare' is either a dead letter, or swells into an unlimited power to provide for unlimited purposes, by all the means necessary and proper for those purposes. And it results finally, that if the Constitution does not give to Congress the unqualified power to provide for the common defence and general welfare, the defect cannot be supplied by the consent of the States, unless given in the form prescribed by the Constitution itself for its own amendment.

As the people of the United States enjoy the great merit of having established a system of Government on the basis of human rights, and of giving to it a form without example, which, as they believe, unites the greatest national strength with the best security for public order and individual liberty, they owe to themserves, to their posterity, and to the world, a preservation of the system in its purity, its symmetry, and its authenticity. This can only be done by a steady attention and sacred regard to the chartered boundaries between the portion of power vested in the Government over the whole, and the portion undivested from the several Governments over the parts composing the whole; and by a like attention and regard to the boundaries between the several departments, Legislative, Executive, and Judiciary, into which the aggregate power is divided. Without a steady eye to the land-marks between these departments, the danger is always

to be apprehended, either of mutual encroachments, and alternate ascendencies incompatible with the tranquil enjoyment of private rights, or of a concentration of all the departments of power into a single one, universally acknowledged to be fatal to public liberty.

And without an equal watchfulness over the great landmarks between the General Government and the particular Governments, the danger is certainly not less, of either a gradual relaxation of the band which holds the latter together, leading to an entire separation, or of a gradual assumption of their powers by the former, leading to a consolidation of all the Governments into a single one.

The two vital characteristics of the political system of the United States are, first, that the Government holds its powers by a charter granted to it by the people; second, that the powers of Government are formed into two grand divisions—one vested in a Government over the whole community, the other in a number of independent Governments over its component parts. Hitherto charters have been written grants of privileges by Governments to the people. Here they are written grants of power by the people to their Governments.

Hitherto, again, all the powers of Government have been, in effect, consolidated into one Government, tending to faction and a foreign yoke among a people within narrow limits, and to arbirtrary rule among a people spread over an extensive region. Here the established system aspires to such a division and organization of power as will provide at once for its harmonious exercise on the true principles of liberty over the parts and over the whole, notwithstanding the great extent of the whole;

the system forming an innovation and an epoch in the science of Government no less honorable to the people to whom it owed its birth, than suspicious to the political welfare of all others who may imitate or adopt it.

As the most arduous and delicate task in this great work lay in the untried demarkation of the line which divides the general and the particular Governments by an enumeration and definition of the powers of the former, more especially the legislative powers; and as the success of this new scheme of polity essentially depends on the faithful observance of this partition of powers, the friends of the scheme, or rather the friends of liberty and of man, cannot be too often earnestly exhorted to be watchful in marking and controlling encroachments by either of the Governments on the domain of the other."

In his letter to Edmund Pendleton, dated January 21, 1792, Madison's Works, Vol. I, p. 545, he says:

"I have reserved for you a copy of the Report of the Secretary of the Treasury on Manufactures, for which I hoped to have found before this a private conveyance, it being rather bulky for the mail. Having not yet succeeded in hitting on an opportunity, I send you a part of it in a newspaper, which broaches a new Constitutional doctrine of vast consequence, and demanding the serious attention of the public. I consider it myself as subverting the fundamental and characteristic principle of the Government; as contrary to the true and fair, as well as the received construction, and as bidding defiance to the sense in which the Constitution is known to have been proposed, advo-

> cated, and adopted. If Congress can do whatever in their *discretion* can be *done by money,* and will promote the *General Welfare,* the Government is no longer a limited one, possessing enumerated powers, but an indefinite one, subject to particular exceptions. It is to be remarked that the phrase out of which this doctrine is elaborated is copied from the old Articles of Confederation, where it was always understood as nothing more than a general caption to the specified powers, and it is a fact that it was preferred in the new instrument for that very reason, as less liable than any other to misconstruction."

Madison's statement with reference to the General Welfare Clause in the XLI Federalist is incorporated in the main brief.

Among the Virginia Resolutions of 1799, with respect to the Alien and Sedition laws, two of them, attributed to Madison, read as follows:

> " 'That this Assembly doth explicitly and peremptorily declare, that it views the powers of the Federal Government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact—as no further valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the States who are parties thereto have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them.' "

"'That the General Assembly doth also express its deep regret that a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases, (which, having been copied from the very limited grant of powers in the former Articles of Confederation, were the less liable to be misconstrued), so as to destroy the meaning and effect of the particular enumeration which necessarily explains and limits the general phrases, and so as to consolidate the States by degrees into one sovereignty, the obvious tendency and inevitable result of which would be to transform the present republican system of the United States into an absolute, or at best a mixed, monarchy.'"

In the Report on the Virginia Resolutions it is said:

"The other questions presenting themselves are—1. Whether indications have appeared of a design to expound certain general phrases copied from the 'Articles of Confederation,' so as to destroy the effect of the particular enumeration explaining and limiting their meaning. 2. Whether this exposition would by degrees consolidate the States into one sovereignty. 3. Whether the tendency and result of this consolidation would be to transform the republican system of the United States into a monarchy.

1. The general phrases here meant, must be those 'of providing for the common defence and general welfare.'

In the 'Articles of Confederation,' phrases are used as follows, in Article VIII: 'All charges of war, and all other expenses that shall be incurred *for the common defence and general welfare,* and allowed by the United States in Congress assembled, shall be defrayed out of the common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States, in Congress assembled, shall from time to time direct and appoint.'

In the existing Constitution they make the following part of Section 8: 'The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States.'

This similarity in the use of these phrases, in the two great Federal charters, might well be considered as rendering their meaning less liable to be misconstrued in the latter; because it will scarcely be said that in the former they were ever understood to be either a general grant of power, or to authorize the requisition or application of money by the old Congress to the common defence and general welfare, except in the cases afterwards enumerated, which explained and limited their meaning; and if such was the limited meaning attached to these phrases in the very instrument revised and re-modeled by the present Constitution, it can never be supposed that, when copied into this Constitution, a different meaning ought to be attached to them.

That, notwithstanding this remarkable security against misconstruction, a design has been

indicated to expound these phrases in the Constitution so as to destroy the effect of the particular enumeration of powers by which it explains and limits them, must have fallen under the observation of those who have attended to the course of public transactions. Not to multiply proofs on this subject, it will suffice to refer to the Debates of the Federal Legislature, in which arguments have on different occasions been drawn, with apparent effect, from these phrases in their indefinite meaning.

To these indications might be added, without looking further, the official Report on Manufactures, by the late Secretary of the Treasury, made on the 5th of December, 1791, and the Report of a Committee of Congress, in January, 1797, on the promotion of Agriculture. In the first of these it is expressly contended to belong 'to the discretion of the National Legislature to pronounce upon the objects which concern the *general welfare,* and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of LEARNING, of AGRICULTURE, of MANUFACTURES, and of COMMERCE, are within the sphere of the National Councils, *as far as regards an application of money'*. The latter Report assumes the same latitude of power in the national councils, and applies it to the encouragement of agriculture by means of a society to be established at the seat of Government. Although neither of these Reports may have received the sanction of a law carrying it into effect, yet, on the other hand, the extraordinary doctrine contained in both has passed without the slightest positive mark of disapprobation from the authority to which it was addressed.

Now, whether the phrases in question be construed to authorize every measure relating to the common defence and general welfare, as contended by some—or every measure only in which there might be an application of money, as suggested by the caution of others—the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers which follow these general phrases in the Constitution; for it is evident that there is not a single power whatever which may not have some reference to the common defence or the general welfare; nor a power of any magnitude, which in its exercise does not involve or admit an application of money. The government, therefore, which possesses power in either one or other of these extents, is a government without the limitations formed by a particular enumeration of powers; and, consequently, the meaning and effect of this particular enumeration is destroyed by the exposition given to these general phrases.

This conclusion will not be affected by an attempt to qualify the power over the 'general welfare', by referring it to cases where the *general welfare* is beyond the reach of separate provisions by the *individual States,* and leaving to these their jurisdictions in cases to which their separate provisions may be competent; for, as the authority of the individual States must in all cases be incompetent to general regulations operating through the whole, the authority of the United States would be extended to every object relating to the general welfare which might, by any possibility, be provided for by the general authority. This qualifying construction, therefore, would have little, if any, tendency to circumscribe the power claimed under the latitude of the terms 'general welfare.'

The true and fair construction of this expression, both in the original and existing Federal compacts, appears to the committee too obvious to be mistaken. In both, the Congress is authorized to provide money for the common defence and *general welfare.* In both, is subjoined to this authority an enumeration of the cases to which their powers shall extend. Money cannot be applied to the *general welfare,* otherwise than by an application of it to some *particular* measure conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to the particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made. This fair and obvious interpretation coincides with and is enforced by the clause in the Constitution which declares that 'no money shall be drawn from the Treasury, but in consequence of appropriations by law.' An appropriation of money to the general welfare would be deemed rather a mockery than an observance of this constitutional injunction.

2. Whether the exposition of the general phrases here combatted would not by degrees consolidate the States into one sovereignty, is a question concerning which the committee can perceive little room for difference of opinion. To consolidate the States into one sovereignty, nothing more can be wanted than to supersede their respective sovereignties in the cases reserved to them, by extending the sovereignty of th United States to all cases of the 'general welfare'—that is to say, *to all cases whatever.*

3. That the obvious tendency and inevitable

result of a consolidation of the States into one sovereignty, would be to transform the republican system of the United States into a monarchy, is a point which seems to have been sufficiently decided by the general sentiment of America. In almost every instance of discussion relating to the consolidation in question, its certain tendency to pave the way to monarchy seems not to have been contested. The prospect of such a consolidation has formed the only topic of controversy. It would be unnecessary, therefore, for the committee to dwell long on the reasons which support the position of the General Assembly. It may not be improper, however, to remark two consequences evidently flowing from an extension of the Federal powers to every subject falling within the idea of the 'general welfare.'

One consequence must be, to enlarge the sphere of discretion allotted to the Executive Magistrate. Even within the legislative limits properly defined by the Constitution, the difficulty of accommodating legal regulations to a country so great in extent and so various in its circumstances has been much felt and has led to occasional investments of powers in the Executive, which involve perhaps as large a portion of discretion as can be deemed consistent with the nature of the Executive trust. In proportion as the objects of legislative care might be multiplied, would the time allowed for each be diminished, and the difficulty of providing uniform and particular regulations for all be increased. From these sources would necessarily ensue a greater latitude to the agency of that department which is always in existence, and which could best mould regulations of a general nature so as to suit them to the diversity of particular situ-

ations. And it is in this latitude, as a supplement to the deficiency of the laws, that the degree of Executive prerogative materially consists.

The other consequence would be, that of an excessive augmentation of the offices, honors, and emoluments, depending on the Executive will. Add to the present legitimate stock all those of every description which a consolidation of the States would take from them and turn over to the Federal Government, and the patronage of the Executive would necessarily be as much swelled in this case as its prerogative would be in the other.

This disproportionate increase of prerogative and patronage must, evidently, either enable the Chief Magistrate of the Union, by quiet means, to secure his re-election from time to time, and finally to regulate the succession as he might please; or, by giving so transcendent an importance to the office, would render the elections to it so violent and corrupt, that the public voice itself might call for an hereditary in place of an elective succession. Whichever of these events might follow, the transformation of the republican system of the United States into a monarchy, anticipated by the General Assembly from a consolidation of the States into one sovereignty, would be equally accomplished; and whether it would be into a mixed or an absolute monarchy might depend on too many contingencies to admit of any certain foresight."

Writings of James Madison, Hunt Edition, Vol. VI, p. 431.

MONROE

In his First Annual Message of December 2, 1817, Monroe said, with reference to internal revenue improvements that he had not considered the power granted to Congress under the Constitution to appropriate money therefor.

On May 4, 1822, he vetoed an act for the preservation and repair of the Cumberland Road on the ground that the appropriation was beyond the power of Congress. On the same day, he transmitted a long message stating his views on the subject of internal improvements, and on the constitutional power with reference thereto. It was in this message that he stated:

> "From this view of the right to appropriate and of the practice under it I think that I am authorized to conclude that the right to make internal improvements has not been granted by the power 'to pay the debts and provide for the common defense and general welfare,' included in the first of the enumerated powers; that that grant conveys nothing more than a right to appropriate the public money, and stands on the same ground with the right to lay and collect taxes, duties, imposts, and excises, conveyed by the first branch of that power; that the Government itself being limited, both branches of the power to raise and appropriate the public money are also limited, the extent of the Government as designated by the specific grants marking the extent of the power in both branches, extending, however, to every object embraced by the fair scope of those grants and not confined to a strict con-

struction of their respective powers, it being safer to aid the purposes of those grants by the appropriation of money than to extend by a forced construction the grant itself; that although the right to appropriate the public money to such improvements affords a resource indispensably necessary to such a scheme, it is nevertheless deficient as a power in the great characteristics on which its execution depends.

"The substance of what has been urged on this subject may be expressed in a few words. My idea is that Congress have an unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate it for purposes of common defense and of general, not local, national, not State, benefit."

Messages and Papers of the Presidents, Vol. II, pp. 144-173.

JACKSON

Jackson adopted the view expressed by Monroe in his message of May 4, 1822. Jackson in his Veto Message of May 27, 1830, returning without approval a bill proposing to authorize a subscription of stock to a turnpike road company says:

"The bill before me does not call for a more definite opinion upon the particular circumstances which will warrant appropriations of money by Congress to aid works of internal improvement, for although the extension of the power to apply money beyond that of carrying into effect the object for which it is appropriated has, as we have seen, been long claimed and exercised by the Federal Government, yet such grants have always been professedly under

the control of the general principle that the works which might be thus aided should be 'of a general, not local, national, not State,' character. A disregard of this distinction would of necessity lead to the subversion of the federal system. That even this is an unsafe one, arbitrary in its nature, and liable, consequently, to great abuses, is too obvious to require the confirmation of experience. It is, however, sufficiently definite and imperative to my mind to forbid my approbation of any bill having the character of the one under consideration. I have given to its provisions all the reflection demanded by a just regard for the interests of those of our fellow-citizens who have desired its passage, and by the respect which is due to a coordinate branch of the Government, but I am not able to view it in any other light than as a measure of purely local character; or, if it can be considered national, that no further distinction between the appropriate duties of the General and State Governments need be attempted, for there can be no local interest that may not with equal propriety be denominated national. It has no connection with any established system of improvements; is exclusively within the limits of a State, starting at a point on the Ohio River and running out 60 miles to an interior town, and even as far as the State is interested conferring partial instead of general advantages.

Considering the magnitude and importance of the power, and the embarrassments to which, from the very nature of the thing, its exercise must necessarily be subjected, the real friends of internal improvement ought not to be willing to confide it to accident and chance. What is properly national in its character or otherwise is an inquiry which is often extremely difficult of solution. The appropriations of one

year for an object which is considered national may be rendered nugatory by the refusal of a succeeding Congress to continue the work on the ground that it is local. No aid can be derived from the intervention of corporations. The question regards the character of the work, not that of those by whom it is to be accomplished. Notwithstanding the union of the Government with the corporation by whose immediate agency any work of internal improvement is carried on, the inquiry will still remain. Is it national and conductive to the benefit of the whole, or local and operating only to the advantage of a portion of the Union?"

Messages and Papers of the Presidents, Vol. II, pp. 483-487-488.

TYLER

Tyler in his Veto Message of June 11, 1844, Messages and Papers of the Presidents, Vol. IV, p. 330, vetoing an act for making appropriations for improvements of certain harbors and rivers, said:

> "There is, in my view of the subject, no pretense whatever for the claim to power which the bill now returned substantially sets up. The inferential power, in order to be legitimate, must be clearly and plainly incidental to some granted power and necessary to its exercise. To refer it to the head of convenience or usefulness would be to throw open the door to a boundless and unlimited discretion and to invest Congress with an unrestrained authority."

He again distinguishes between certain appropriations in the act, which he thinks come within

the Constitution, of which the Delaware Breakwater is one. He says that others are of mere local concern.

POLK

Polk in a Veto Message of August 3, 1846, Messages and Papers of the Presidents, Vol. IV, p. 460, vetoes an act making appropriation for certain internal improvements on the ground that the act is unconstitutional. He says:

> "The whole frame of the Federal Constitution proves that the Government which it creates was intended to be one of limited and specified powers. A construction of the Constitution so broad as that by which the power in question is defended tends imperceptibly to a consolidation of power in a Government intended by its framers to be thus limited in its authority. 'The obvious tendency and inevitable result of a consolidation of the States into one sovereignty would be to transform the republican system of the United States into a monarchy.' To guard against the assumption of all powers which encroach upon the reserved sovereignty of the States, and which consequently tend to consolidation, is the duty of all the true friends of our political system. That the power in question is not properly an incident to any of the granted powers I am fully satisfied; but if there were doubts on this subject, experience has demonstrated the wisdom of the rule that all the functionaries of the Federal Government should abstain from the exercise of all questionable or doubtful powers. If an enlargement of the powers of the Federal Government should be deemed proper, it is safer

and wiser to appeal to the States and the people in the mode prescribed by the Constitution for the grant desired than to assume its exercise without an amendment of the Constitution."

In his message of December 5, 1847, Messages and Papers of the Presidents, Vol. IV, p. 610, he explains his reasons for not approving an act to provide for continuing certain works in the Territory of Wisconsin. He followed his earlier view, but in the course of his message said:

"We have seen in our States that the interests of individuals or neighborhoods, combining against the general interest, have involved their governments in debts and bankruptcy; and when the system prevailed in the General Government, and was checked by President Jackson, it had begun to be considered the highest merit in a member of Congress to be able to procure appropriations of public money to be expended within his district or State, whatever might be the object. We should be blind to the experience of the past if we did not see abundant evidences that if this system of expenditure is to be indulged in combinations of individual and local interests will be found strong enough to control legislation, absorb the revenues of the country, and plunge the Government into a hopeless indebtedness. * * * Such a system is subject, moreover, to be perverted to the accomplishment of the worst of political purposes. During the few years it was in full operation, and which immediately preceded the veto of President Jackson of the Marysville road bill, instances were numerous of public men seeking to gain popular favor by holding out to the people interested in par-

ticular localities the promise of large disbursements of public money. Numerous reconnoissances and surveys were made during that period for roads and canals through many parts of the Union, and the people in the vinicity of each were led to believe that their property would be enhanced in value and they themselves be enriched by the large expenditures which they were promised by the advocates of the system should be made from the Federal Treasury in their neighborhood. Whole sections of the country were thus sought to be influenced, and the system was fast becoming one not only of profuse and wasteful expenditure, but a potent political engine."

PIERCE

President Pierce in his Veto Message of December 30, 1854, Messages and Papers of the Presidents, Vol. V, p. 257, on pages 258 and 259 says:

"It is quite obvious that if there be any constitutional power which authorizes the construction of 'railroads and canals' by Congress, the same power must comprehend turnpikes and ordinary carriage roads; nay, it must extend to the construction of bridges, to the draining of marshes, to the erection of levees, to the construction of canals of irrigation; in a word, to all possible means of the material improvement of the earth, by developing its natural resources anywhere and everywhere, even within the proper juridsiction of the several States. But if there be any constitutional power thus comprehensive in its nature, must not the same power embrace within its scope other kinds of improvements of equal utility in themselves and equally important to the welfare of the whole country? Presi-

dent Jefferson, while intimating the expediency of so amending the Constitution as to comprise objects of physical progress and well-being, does not fail to perceive that 'other objects of public improvement,' including 'public education' by name, belong to the same class of powers. In fact, not only public instruction, but hospitals, establishments of science and art, libraries, and, indeed, everything appertaining to the internal welfare of the country, are just as much objects of internal improvement, or, in other words, of internal utility, as canals and railways.

The admission of the power in either of its senses implies its existence in the other; and since if it exists at all it involves dangerous augmentation of the political functions and of the patronage of the Federal Government, we ought to see clearly by what clause or clauses of the Constitution it is conferred.

I have had occasion more than once to express, and deem it proper now to repeat, that it is, in my judgment, to be taken for granted, as a fundamental proposition not requiring elucidation, that the Federal Government is the creature of the individual States and of the people of the States severally; that the sovereign power was in them alone; that all the powers of the Federal Government are derivative ones, the enumeration and limitations of which are contained in the instrument which organized it; and by express terms 'the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people.'

Starting from this foundation of our constitutional faith and proceeding to inquire in

what part of the Constitution the power of making appropriations for internal improvements is found, it is necessary to reject all idea of there being any grant of power in the preamble. When that instrument says, 'We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity,' it only declares the inducements and the anticipated results of the things ordained and established by it. To assume that anything more can be designed by the language of the preamble would be to convert all the body of the Constitution, with its carefully weighed enumerations and limitations, into mere surplusage. The same may be said of the phrase in the grant of the power to Congress 'to pay the debts and provide for the common defense and general welfare of the United States;' or, to construe the words more exactly, they are not significant of grant or concession, but of restriction of the specific grants, having the effect of saying that in laying and collecting taxes for each of the precise objects of power granted to the General Government Congress must exercise any such definite and undoubted power in strict subordination to the purpose of the common defense and general welfare of all the State."

In his Veto Message of May 3, 1854, Messages and Papers of the Presidents, Vol. V, p. 247, returning without approval a bill to make a grant of public lands to the several states for the benefit of indigent insane persons, President Pierce says:

"I shall not discuss at length the question of power sometimes claimed for the General Government under the clause of the eighth section of the Constitution, which gives Congress the power 'to lay and collect taxes, duties, imposts, and excises, to pay debts and provide for the common defense and general welfare of the United States,' because if it has not already been settled upon sound reason and authority it never will be. I take the received and just construction of that article, as if written to lay and collect taxes, duties, imposts, and excises in order to pay the debts and in order to provide for the common defense and general welfare. It is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties, and imposts. If it were otherwise, all the rest of the Constitution, consisting of carefully enumerated and cautiously guarded grants of specific powers, would have been useless if not delusive." * * *

"If the time shall ever arrive when, for an object appealing, however strongly, to our sympathies, the dignity of the States shall bow to the dictation of Congress by conforming their legislation thereto, when the power and majesty and honor of those who created shall become subordinate to the thing of their creation, I but feebly utter my apprehensions when I express my firm conviction that we shall see 'the beginning of the end.'" * * *

"To say that it was a charitable object is only to say that it was an object of expenditure proper for the competent authority; but it no more tended to show that it was a proper object of expenditure by the United States than is any other purely local object appealing to the best sympathies of the human heart in

any of the States. And the suggestion that a school for the mental culture of the deaf and dumb in Connecticut or Kentucky is a national object only shows how loosely this expression has been used when the purpose was to procure appropriations by Congress. It is not perceived how a school of this character is otherwise national than is any establishment of religious or moral instructions. All the pursuits of industry, everything which promotes the material or intellectual well-being of the race, every ear of corn or boll of cotton which grows, is national in the same sense, for each one of these things goes to swell the aggregate of national prosperity and happiness of the United States; but it confounds all meaning of language to say that these things are 'national,' as equivalent to 'Federal,' so as to come within any of the classes of appropriation for which Congress is authorized by the Constitution to legislate." * * *

"Messages and Papers of the Presidents," Vol. V, pp. 250-251-255.

CLEVELAND

The Veto Message of President Cleveland of February 16, 1887, Messages and Papers of the Presidents, Vol. VIII, p. 557, returning without approval an act to enable the Commissioner of Agriculture to make distribution of seeds to Texas, and making appropriation therefor, it is said:

"I return without my approval House Bill No. 10203, entitled, 'An act to enable the Commissioner of Agriculture to make a special distribution of seeds in the drought-stricken counties of Texas, and making appropriation therefor.'

"It is represented that a long-continued and extensive drought has existed in certain portions of the State of Texas, resulting in a failure of crops and consequent distress and destitution.

"Though there has been some difference in statements concerning the extent of the people's needs in the localities thus affected, there seems to be no doubt that there has existed a condition calling for relief; and I am willing to believe that, notwithstanding the aid already furnished, a donation of seed grain to the farmers located in this region, to enable them to put in new crops, would serve to avert a continuance or return of an unfortunate blight.

"And yet I feel obliged to withhold my approval of the plan, as proposed by this bill, to indulge a benevolent and charitable sentiment through the appropriation of public funds for that purpose.

"I can find no warrant for such an appropriation in the Constitution, and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power and duty should, I think, be steadfastly resisted, to the end that the lesson should be constantly enforced that though the people support the Government the Government should not support the people.

"The friendliness and charity of our countrymen can always be relied upon to relieve their fellow-citizens in misfortune. This has been repeatedly and quite lately demonstrated. Federal aid in such cases encourages the expectation of paternal care on the part of the Gov-

ernment and weakens the sturdiness of our national character, while it prevents the indulgence among our people of that kindly sentiment and conduct which strengthens the bonds of a common brotherhood.

"It is within my personal knowledge that individual aid has to some extent already been extended to the sufferers mentioned in this bill. The failure of the proposed appropriation of $10,000 additional to meet their remaining wants will not necessarily result in continued distress if the emergency is fully made known to the people of the country.

"It is here suggested that the Commissioner of Agriculture is annually directed to expend a large sum of money for the purchase, propagation, and distribution of seeds and other things of this description, two-thirds of which are, upon the request of Senators, Representatives, and Delegates in Congress, supplied to them for distribution among their constituents.

"The appropriation of the current year for this purpose is $100,000, and it will probably be no less in the appropriation for the ensuing year. I understand that a large quantity of grain is furnished for such distribution, and it is supposed that this free apportionment among their neighbors is a privilege which may be waived by our Senators and Representatives.

"If sufficient of them should request the Commissioner of Agriculture to send their shares of the grain thus allowed them to the suffering farmers of Texas, they might be enabled to sow their crops, the constituents for whom in theory this grain is intended could well bear the temporary deprivation, and the donors would experience the satisfaction attending deeds of charity."

In his Veto Message of March 2, 1889, Messages and Papers of the Presidents, Vol. VIII, p. 837, President Cleveland said:

> "It is my belief that this appropriation of the public funds is not within the constitutional power of the Congress. Under the limited and delegated authority conferred by the Constitution upon the General Government the statement of the purposes for which money may be lawfully raised by taxation in any form declares also the limit of the objects for which it may be expended.
>
> "All must agree that the direct tax was lawfull and constitutionally laid and that it was rightfully and correctly collected. It cannot be claimed, therefore, nor is it pretended, that any debt arose against the Government and in favor of any State or individual by the exaction of this tax. Surely, then, the appropriation directed by this bill cannot be justified as a payment of a debt of the United States.
>
> "The disbursement of this money clearly has no relation to the common defense. On the contrary, it is the repayment of money raised and long ago expended by the Government to provide for the common defense.
>
> "The expenditure cannot properly be advocated on the ground that the general welfare of the United States is thereby provided for or promoted. This 'general welfare of the United States', as used in the Constitution, can only justify apropriations for national objects and for purposes which have to do with the prosperity, the growth, the honor, or the peace and dignity of the nation.

"A sheer, bald gratuity bestowed either upon States or individuals, based upon no better reason than supports the gift proposed in this bill, has never been claimed to be a provision for the general welfare. More than fifty years ago a surplus of public money in the Treasury was distributed among the States; but the unconstitutionality of such distribution, considered as a gift of money, appears to have been conceded, for it was put into the State treasuries under the guise of a deposit or loan, subject to the demand of the Government."

In his Veto Message of May 29, 1896, Messages and Papers of the Presidents, Vol. IX, p. 677, in returning without his approval an act making appropriation for the construction, repair and preservation of certain public works on rivers and harbors and other purposes, President Cleveland says:

"In view of the obligation imposed upon me by the Constitution, it seems to me quite clear that I only discharge a duty to our people when I interpose my disapproval of the legislation proposed.

"Many of the objects for which it appropriates public moneys are not related to the public welfare, and many of them are palpably for the benefit of limited localities or in aid of individual interests. * * *

"To the extent that the appropriations contained in this bill are instigated by private interests and promote local or individual projects their allowance cannot fail to stimulate a vicious paternalism and encourage a sentiment among our people, already too prevalent, that their attachment to our Govern-

ment may properly rest upon the hope and expectation of direct and especial favors and that the extent to which they are realized may furnish an estimate of the value of governmental care."

TREATISES ON CONSTITUTION

In his work on The Constitution, Tucker, Vol. 1, 478 to 480, says:

"It would really seem absurd to impute to the framers of the Constitution a purpose to comprehend objects far beyond the powers it conferred upon the government. It is argued everywhere in the Federalist that power ought to be commensurate with purpose. But this construction, insisted on by Hamilton and his followers, would indicate that the Constitution contemplated the unlimited expenditure of money, to be raised by taxation under governmental power, to carry out objects which were not within the control given, or the powers committed to, Congress. Power and purpose were not commensurate, except that by this construction Congress had unlimited discretion to raise and expend money by taxation, to aid and accomplish purposes and objects that were beyond the power of Congress to effect; which involves the conclusion that the Constitution trusted Congress to spend money for objects which might be regulated and controlled by other governments, but would not trust Congress to create and regulate these objects of appropriation."

* * * * * * * *

"If, under the Tenth Amendment of the Constitution, a specific power to do a particular thing is not delegated to the United

States by the Constitution, then it is reserved to the States. Such a thing is in no way within the control and discretion of the United States. If it be within the words 'common defense and general welfare,' still, as those words grant no power, Congress cannot exercise it. And yet, despite this, the construction contended for would give to Congress unlimited power to spend any amount of money to carry out a project or scheme clearly and only within the reserved powers of the States. Is it legitimate to give to the power of taxation, which is ordinarily but a means for effecting the purposes of power, the larger function of unlimited discretion in selecting objects not within the delegated power as the recipients of the benefactions of revenue? Is it legitimate thus indirectly to carry into effect an ungranted power—a power which, being ungranted and if not prohibited to the States, is reserved to them? Is not this a usurpation by indirection, through taxation, as flagrant as if it were a bald exercise of the ungranted power? Judge Story says that this construction is conformable to the proposition 'to legislate in all cases for the general interests of the Union.' But that proposition was never adopted, and was rejected. Is it legitimate, then, to conform the construction of the words 'to provide for the common defense and general welfare' to a purpose which was proposed and rejected? It is true that Mr. Hamilton, in his draft of a Constitution, proposed that Congress should have 'power to pass all laws whatsoever, subject to the negative hereafter mentioned,' and that the President should have power to negative all laws pasesd in the State by a Governor or President, who shall be appointed by the general Government. Again, in Article VII of his scheme of a Constitution, he proposed that 'the Legisla-

ture of the United States shall have power to pass all laws which they shall judge necessary to the common defense and general welfare of the Union.' But this proposition of Mr. Hamilton was displaced by the provision of the Constitution which clearly enumerated the powers delegated to Congress." * * *

"If Congress can thus by appropriation exercise this power, it would indirectly exercise a power not granted, and since denied to it. If so, what use would there be for the Tenth Amendment or for Article I, Sec. 1, of the Constitution? It is an anomaly to hold that any government can raise money except as a means to execute its own power. Taxation is a great power; but in itself it does nothing except as it is a means for doing that which is within the powers to be carried out by a government. That a government should have this great means to execute the powers of other governments reaches the point of absurdity. Why should government be given the means to execute a power which is denied to it and confided to another? Why give it the power to help another to do what is denied to it? If Congress cannot be trusted with the grant of a power, why give unlimited discretion to Congress to raise money to enable one not entrusted with the power by Congress to perform it? Can such folly be attributed to the framers of the Constitution? It is obvious that the mass of powers which Congress would thus exercise by means of its revenue powers are powers which are reserved to the States; for the powers not delegated to the United States, unless prohibited to the States, are reserved to them. Thus it would follow that the revenue to be expended by Congress under this construction would be expended for the execution of powers which were reserved to

> the States. The effect then would be that while Congress is denied the particular power, it could effectually execute the power and invade the domain of State reservation by the expenditure of money; and conditioning the expenditure of money upon the substantial concession of power would through money, virtually absorb the autonomy of the States and consolidate the whole Governmental system into centralism."

Willoughby on The Constitutional Law of the United States adopts the Hamilton view. In Section 63, however, he states that an appropriation of public money for a purely private purpose would be unconstitutional. He also takes the view in Section 62 that the power is limited as expressed by Monroe to purposes which must be general and not local.

Warren in his two books, Making of the Constitution and Congress is Santa Claus, reviews the proceedings of the Constitutional Convention. He adopts the view of Mr. Madison with reference to the General Welfare Clause. He analyzes the appropriations which had been made by Congress and which were not within the powers of the General Government as he viewed them. He calls attention to the fact that even under the view of Story, the appropriation must be for a general or national purpose and not for a local one. With respect to the congressional practices, in his Congress is Santa Claus, he says:

"It is only within the last twenty-five years, therefore, that the flood of laws bestowing Government alms has deluged our statute books. Moreover, in only one instance—the Maternity Act—has any attempt been made to test the Constitutionality of these laws in the Supreme Court; and in that instance, the Court held that it had no jurisdicion. Hence, the precedents are not weighty evidence of Congressional power; for, as the Supreme Court has stated in a recent case, the weight of the 'use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence' must depend, in part, 'upon the number of instances in the execution of the law in which opportunity for objection in the Courts or elsewhere is afforded.'

"In view of these conditions as to Legislative precedents, it seems peculiarly unfortunate that the Supreme Court has never rendered a decision upon two fundamentally important questions which would determine the Constitutionality of such legislation—first, whether the Madison or the Hamilton construction of the General Welfare clause is correct; second, whether legislation for the benefit of favored individuals or classes of individuals is within the meaning of the words 'General Welfare.'"

No. 7773

In the United States Circuit Court of Appeals for the Ninth Circuit

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CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN AND C. C. HODGE, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

Upon Appeal from the United States District Court for the District of Idaho, Northern Division

---

SUPPLEMENTAL BRIEF OF APPELLEE.

JOHN P. GRAY,
A. J. G. PRIEST,
W. F. McNAUGHTON,
ROBT. H. ELDER,
Attorneys for Appellee.

SHAW & BORDEN CO. 255938

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7773

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN AND C. C. HODGE, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

Upon Appeal from the United States District Court for the District of Idaho, Northern Division

---

SUPPLEMENTAL BRIEF OF APPELLEE.

There are a few matters which counsel for appellee desire to call to the attention of the court in this supplemental brief.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE INTERLOCUTORY INJUNCTION:

We desire to call the court's attention to the decision in *Wilshire Oil Co. v. United States,* decided April 29, 1935. It would seem that the language of the Supreme Court in that case is applicable to the case at bar.

PLAINTIFF'S RIGHT TO MAINTAIN THE SUIT:

In addition to the authorities which are set forth in the brief, there is the recent decision of the District Court of the United States for the Western District of South Carolina in *Duke Power Co. and Southern Public Utilities Co. v. Greenwood County et al and Harold L. Ickes, as Federal Emergency Administrator of Public Works,* a copy of the opinion in which case was handed to the Clerk.

That case sustains the right of the plaintiff to maintain such an action as the one involved in this cause. The decision of the court follows *Frost v. Corp. Com. of Oklahoma,* 278 U. S. 515, and cites in support of the conclusion, *Gallardo v. Porto Rico Ry. L. & P. Co.* 18 Fed. (2) 918; *City of Campbell, Mo. v. Arkansas-Missouri Power Co.* 55 Fed. (2) 560, 562; *Iowa Southern Utilities Co. v. Cassill,* 69 Fed. (2) 703, 704; *Oklahoma Utilities Co. v. City of Hominy,* 2 Fed. Supp. 849; *Missouri Public Service Co. v. City of Concordia,* 8 Fed. Supp. 1, 4; *Princeton Power Co. v. Calloway,* 128 S. E. 89; *Puget Sound Traction, etc., Co. v. Grassmeyer,* 102 Wash. 482, 173, Pac. 504, L. R. A. 1918-F, 469, 474.

CONSTITUTIONALITY OF TITLE II OF NATIONAL INDUSTRIAL RECOVERY ACT.

The case of *Duke Power Co., etc. v. Greenwood County et al and Harold L. Ickes* above referred to, also passes upon the constitutionality of Title II of the National Industrial Recovery Act as the same provides for the establishment of the Public Works Administration and as applicable to the loan and grant of moneys for the purpose of constructing a competing electric system—the same question which is involved in this case.

The court holds that that power in the general government is not to be found either in the Commerce Clause or the General Welfare Clause.

The court in its conclusion says:

> "It is enough to say that the Act here questioned, as applied to the facts of this case, extends the taxation and appropriating powers of Congress to an extent heretofore undreamed of, and that, in our judgment, the right to challenge has not been lost by previous acquiescence in any governmental policy. That many of the provisions of the Act in question are constitutional is not here, and cannot be successfully, questioned. The power of Congress in its discretion to provide any unlimited amount, however extravagant, for the construction of necessary or proper public buildings, to support the army and navy, to provide for post offices and post roads, to exercise control over interstate commerce, to appropriate whatever funds it may find advisable therefor, and to tax for the maintenance of its governmental activities generally, even though the purpose of the act be largely to relieve unemployment and to increase the spending power of the people, is not subject to review. So long as Congress legislates within the delegated powers outlined in the Constitution, neither its power nor discretion may be reviewed by the courts. We think it pertinent here to remark that the field and the need for public appropriations have not yet been fully covered. The recognized lack of public buildings at Anderson and Greenwood furnishes apt illustration."

The case supports the position of appellee.

TITLE II, SECTIONS 201, 202 AND 203 OF THE NATIONAL INDUSTRIAL RECOVERY ACT DOES NOT AUTHORIZE THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS TO MAKE THE LOAN AND GRANT TO THE CITY OF COEUR D'ALENE:

In our original brief, pages 95 and 96, we called attention to the fact that in the Senate by an amendment proposed by Senator Norris, it was proposed to enlarge the provisions of Section 202, sub-division (b) by adding after the word "transmission" the words "generating and distribution" so that subdivision (b) would read:

> "(b) Conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission, *generation and distribution* of electrical energy, and construction of river and harbor improvements and flood control, etc."

Reference is made to the 77th Congressional Record, page 5620. This reference is to the report of the Conference Committee showing that the amendment (Senate Amendment No. 44) was rejected. It was first offered by Mr. Norris on page 5309 of the Congressional Record. The discussion of the report of the Conference Committee on this amendment is found at pages 5853 and 5854 of the Congressional Record. The report of the conferees was adopted and the amendment of Senator Norris was eliminated (p. 5861).

The opinions expressed by senators upon the floor in seeking to secure the adoption of the conference report are not appropriate sources of information upon which to determine the meaning of a statute.

However, this debate shows that the precise questions were raised there by Senator Norris and conferees of the House would not consent to the insertion of the Norris amendment.

We are forwarding to the Clerk for the convenience of the court photostatic copies of the pages of the Congressional Record referred to so that if it is not at hand the court can examine the photostatic copy.

QUESTIONS ASKED BY THE COURT IN THE ARGUMENT:

The presiding Judge asked counsel for appellee during the argument what items of cost or expenses were taken into consideration in the figures shown on page 9 of appellee's brief and in paragraph XIII of the complaint setting forth the average rate per kilowatt hour charged by appellee in the City of Coeur d'Alene, and the rate which the city would have to secure under the set-up of the engineer employed by the city. The answer to the questions was not complete and not again referred to in the argument. The allegations are found in paragraph XIII of the complaint.

The Rate Received by Plaintiff:

The rate received by plaintiff is the actual rate, namely 3.33c per kilowatt hour, exclusive of the power used for pumping.

The Rate Necessary for the City:

This is alleged to be an average cost to the consumer of 3.43c per kilowatt hour, exclusive of power used for water pumping. It is based upon the assumptions in the report of the engineer for the city and upon the estimated average rate which would be necessary to make the city system self-liquidating and permit it to carry its costs. This includes the cost of production, interest and a sinking fund to take care of the principal without any account for taxes or depreciation. It is further based upon the assumption that the municipal plant would secure 80% of the gross consumption, which plaintiff alleges it would be unable to secure. It is also based upon the assumption of the city engineer that the plant proposed by him would be adequate to supply 80% of the load, which again the plaintiff denies. It also involved the assumption of the engineer for the city that fuel oil could be secured for 6c per gallon, whereas the cost actually at the time the complaint was filed was 6.91c and may well go higher. This feature of the case is more fully set forth in the affidavit of Richard McKay in support of the application for the interlocutory injunction found at pages 128 to 133 of the record.

In some respects, the answers of counsel for appellee to the presiding judge with reference to these figures were inaccurate, and this statement is intended not only as a statement of the allegations of the complaint and the contents of the affidavit

in support of the application, but as a correction of any such statements made in oral argument.

THE IDAHO CONSTITUTION:

In the reply brief filed on behalf of Harold L. Ickes, counsel for Mr. Ickes undertakes to adopt the same argument which was advanced by counsel for the city where on page 4 of the typewritten brief it is said:

> "It would seem that an indebtedness or liability declared void by the Constitution (referring to the Constitution of Idaho) could not be the subject matter of a judgment against the City of Coeur d'Alene by the government or other party"

and cites Missouri Utilities Co. v. City of California in support of his position.

It is enough to call the attention of this court to the fact that the Supreme Court of Idaho has regarded an injunction restraining the issuance of illegal and unconstitutional obligations as an appropriate remedy. *Feil v. City of Coeur d'Alene,* 23 Id. 32-49; *Straughan v. City of Coeur d'Alene,* 53 Ida. 494. The same argument was advanced here as was advanced in the Supreme Court of Idaho in *Feil v. City of Coeur d'Alene.* In the course of the opinion in answering that the court says:

> "But it is said that the city is not going to pay for it; that somebody else is going to pay for it. If the city has any right to obligate *anyone other than the city* to pay for this water system, then the contention made that there is

> no city obligation may be true. But when we turn to the constitution, we find that it does not merely prohibit the city from incurring any *municipal* indebtedness or liability, but it prohibits it incurring *any* indebtedness or liability. Now, if the city has the power to obligate the water consumers to pay for this system or to obligate any specific property to pay for it, or any particular class of citizens to pay for it, then it is prohibited as much by Sec. 3, Art. 8, of the Constitution from *incurring such indebtedness or liability* as if it were a *city* indebtedness or liability, because the constitution says it 'shall not incur any indebtedness or liability' exceeding a certain limitation without at the same time levying an annual tax to meet such obligation and submitting the question to a vote of the people."

The above case of *Feil v. City of Coeur d'Alene* settles the question so far as the Idaho Constitution is concerned. Referring to that case, we call attention to the fact that the court there held that it is clearly the law that the city is subject to the same rules and regulations under the constitution and statute fixing reasonable rates as are individuals and private corporations.

ADDITIONAL AUTHORITY.

We desire to add to the citation of *Ely v. Northern Pacific Ry. Co.,* 197 U. S. 1, which is found at page 113 of our original brief, the later case of *Gallardo v. Smallwood,* 275 U. S. 56.

ERROR IN CITATION IN THE ORIGINAL BRIEF.

On page 45 of the original brief of appellee there is cited the case of *Guadeloupe v. Porto Rico Light & Power Co.* This was an error in printing. The case is *Gallardo v. Porto Rico Light and Power Co.*, 18 Fed. (2d) 918.

Respectfully submitted,

JOHN P. GRAY,
A. J. G. PRIEST,
W. F. McNAUGHTON,
ROBT. H. ELDER,
Attorneys for Appellee.

No. 7776

7

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

CARL F. NOBLE,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

Parker Printing Co., 545 Sansome Street, San Francisco 60—3-25-35

No. 7776

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

CARL F. NOBLE,

Appellee.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Messrs. MOLUMBY, BUSHA & GREENAN,
Great Falls, Montana,
Attorneys for Plaintiff and Appellee.
Mr. JAMES H. BALDWIN,
United States Attorney,
Mr. R. LEWIS BROWN,
Assistant United States Attorney, and
Mr. FRANCIS J. McGAN,
Attorney, Department of Justice,
all of Butte, Montana,
Attorneys for Defendant and Appellant. [1*]

In the District Court of the United States in and for the District of Montana

No. 895

CARL F. NOBLE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

BE IT REMEMBERED, that on April 11th, 1932, the Complaint was duly filed herein, in the words and figures following, to wit: [2]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

COMPLAINT.

Plaintiff complains of the defendant and alleges:

I.

That at all the times herein mentioned the plaintiff was and still is a citizen of the United States and a resident of the State of Montana.

II.

That on or about the 20th day of September, 1917, the plaintiff enlisted in the armed forces of the United States; that he served the defendant in the United States Army from said date down to and including the 30th day of July, 1919, when he was discharged from said Army, and that during all of the said time he was employed in the active service of the defendant during the war with Germany and its allies.

III.

That between said dates the plaintiff made application for insurance under the provision of Article Four of the War Risk Insurance Act of Congress, and the rules and regulations of the War Risk Insurance Bureau established by said Act, in the sum of Ten Thousand Dollars ($10,000.00) and that thereafter there was duly issued to the plaintiff by said War Risk Insurance Bureau a certificate of his compliance with the War Risk Insurance Act, so as to entitle him, and his beneficiaries, to the benefits of said Act, and

the other Acts of Congress relating thereto, and the rules and regulations promulgated by the War Risk Insurance Bureau, the Veterans' Bureau, [3] and the Directors thereof, and that during the term of his service with the said War Department, in said Army as aforementioned, there was deducted from his pay for said services by the United States Government, through its proper officers, the monthly insurance premiums provided for by said Act and the rules and regulations promulgated by the War Risk Insurance Bureau, the Veterans' Bureau, and the Directors thereof.

IV.

That during the period of his service in said War with Germany and its allies as above mentioned and while said insurance was in full force and effect the plaintiff contracted certain diseases and disabilities and suffered certain injuries, which said diseases, injuries and disabilities have continuously since the date of his discharge from the defendant's army, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases and disabilities and injuries are of such a nature and founded upon such conditions that it is reasonable to suppose and believe that it will continue throughout the lifetime of the plaintiff to so render the plaintiff unable to follow any substantially gainful occupation, and that the plaintiff has been ever since his discharge from the defendant's army and still is totally and permanently

disabled by reason of and as a direct and proximate result of such diseases, injuries and disabilities received and contracted while his War Risk Insurance was in full force and effect.

V.

That the plaintiff made application to the United States Government, through the Veterans Bureau, and the Director thereof, and the Bureau of War Risk Insurance, and the Veterans' Administration and the Director thereof, for the payment of said insurance, and for the monthly payments due under the provisions of said War Risk Insurance Act, for total permanent disability, and that the said Veterans' Bureau, and the said Bureau of War Risk Insurance, and Veterans' Administration and the Directors and Administrators thereof, have refused to pay the plaintiff the amount provided for by the War Risk Insurance Act, and have disputed [4] the claim of the plaintiff to the benefits of said War Risk Certificate, issued under the Act, and have refused to grant him said benefits and have disagreed with him concerning his rights to the insurance benefits of said Act.

VI.

That under the provisions of the War Risk Insurance Act and the other acts of Congress relating thereto the plaintiff is entitled to the payment of Fifty-Seven and 50/100ths Dollars ($57.50) for each

and every month transpiring from and after the date of his discharge from the defendant's army and all such monthly installments accruing since the date of his discharge are now due and owing from the defendant to the plaintiff.

VII.

Plaintiff has employed the services of Molumby, Busha & Greenan, Lawyers, duly licensed to practice their profession in the State of Montana to prosecute this action to a conclusion and that under the provisions of the War Risk Insurance Act, the court as a part of this judgment or decree may allow as a reasonable attorney's fee the sum of ten percent (10%) of the amount recovered under the contract of insurance and to be paid by the bureau out of the payment to be made under the judgment and in accordance with the law at a rate not to exceed one-tenth (1/10) of each of such payments until paid and that ten percent (10%) is a reasonable Attorneys' fee in the premises.

WHEREFORE, Plaintiff prays judgment as follows:

1. For the sum of Fifty-Seven and 50/100ths ($57.50) Dollars per month for each and every month elapsing from and after the 30th day of July, 1919 until the date of judgment herein.

2. That the Court as a part of its judgment or decree direct that ten percent (10%) of the amount recovered out of the contract of insurance and to be paid by the bureau out of the payments to be made

under the judgment and in accordance with the law and at a rate not to exceed one-tenth (1/10) of [5] each of such payments be paid to the attorneys for the plaintiff as a reasonable attorneys' fee.

3. For such other and further relief as to the court may seem just.

MOLUMBY, BUSHA & GREENAN
Attorneys for Plaintiff.

State of Montana:
County of Cascade:—ss.

C. T. Busha, Jr., being first duly sworn, upon oath deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the reason this verification is made by this affiant is that the plaintiff does not now reside in the County of Cascade wherein this affiant resides and makes this verification.

C. T. BUSHA, Jr.

Subscribed and sworn to before me this 11th day of April, 1932.

[Seal] C. F. HOLT
Notary Public for the State of Montana. Residing at Great Falls, Montana. My Commission expires Feb. 10, 1935.

[Endorsed]: Filed April 11, 1932. C. R. Garlow, Clerk. [6]

Thereafter, on April 11, 1932, Summons was duly issued herein, in the words and figures following, to wit: [7]

[Title of Court and Cause.]

SUMMONS.

The President of the United States of America, Greeting:

To the Above-named Defendant:

United States of America

You are Hereby Summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiff's attorney within sixty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable Charles N. Pray, Judge of the United States District Court, District of Montana, this 11th day of April in the year of our Lord one thousand nine hundred and thirty-two and of our Independence the one hundred and fifty-sixth.

[Seal] C. R. GARLOW,
Clerk.
By C. G. Kegel, Deputy Clerk. [8]

United States Marshal's Office
District of Montana

I hereby Certify, that I received the within summons on the 4th day of Feb., 1933, and personally served the same on the 4th day of February, 1933, on United States of America by delivery to, and leaving with D. L. Egnew, Assistant U. S. Attorney personally, at Billings, County of Yellowstone in said District, a copy thereof, together with a copy of the Complaint, attached thereto.

Dated this 4th day of February, 1933.

ROLLA DUNCAN,
U. S. Marshal.
By E. B. Fellows, Deputy.

[Endorsed]: Filed February 7, 1933. [9]

Thereafter on May 13, 1933, Answer was duly filed herein in the words and figures following, to-wit: [10]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant and for answer to plaintiff's complaint herein, admits, denies and alleges as follows: to-wit:

I.

Admits Paragraphs 1 and 2 of said complaint.

II.

Admits the allegations of Paragraph 3 of said complaint, but in that connection alleges that the

War Risk Insurance policy issued to plaintiff lapsed and was cancelled on October 1, 1919 for non-payment of the premium due thereon September 1, 1919.

III.

Denies Paragraphs 4, 5, 6 and 7 of said complaint.

IV.

Except as herein specifically admitted, qualified or denied, denies generally and specifically each and every and all of the allegations in said complaint contained.

V.

WHEREFORE, having fully answered, defendant prays judgment that plaintiff take nothing herein, and that plaintiff's complaint be dismissed and that defendant have its costs.

WELLINGTON D. RANKIN,
United States Attorney.
D. L. EGNEW,
Assistant United States Attorney
for the District of Montana.
D. D. EVANS,
Insurance Attorney.
Attorneys for the Defendant [11]

State of Montana,
County of Lewis & Clark—ss.

D. L. Egnew, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified, and acting Assistant United States Attorney for the District

of Montana, and as such makes this verification to the foregoing answer; that he has read the answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

D. L. EGNEW.

Subscribed and sworn to before me this 11 day of May, 1933.

[Seal] C. R. GARLOW,
Clerk.

[Endorsed]: Filed May 13, 1933. [12]

Thereafter, on November 1st, 1934, the Verdict of the jury was duly rendered and filed herein, in the words and figures following, to-wit:

[Title of Court and Cause.]

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff and against the defendant, and assess his damages in the amount of the installments of War Risk Insurance accruing from and after the 30th day of July, 1919, the date of his discharge.

G. H. PACKARD,
Foreman.

[Endorsed]: Filed Nov. 1, 1934. [13]

Thereafter on November 1, 1934, Judgment was filed and entered herein in the words and figures following, to-wit: [14]

In the District Court of the United States in and for the District of Montana, Great Falls, Division.

No. 895

CARL F. NOBLE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

THIS CAUSE came on regularly to be tried on the 29th day of October, 1934, Molumby, Busha & Greenan appearing as counsel for the plaintiff, James H. Baldwin, United States Attorney, Louis Brown, Assistant United States Attorney and Francis McGan, Attorney, Department of Justice, appearing as counsel for the defendant. A jury of twelve persons was regularly empaneled and sworn to try said cause; witnesses on the part of the plaintiff and the defendant were sworn and examined; after hearing the evidence, arguments of counsel and the instructions of the Court, the jury retired to consider of their verdict, and returned into Court their verdict in words and figures as follows:

"WE, THE JURY, in the above entitled cause, find for the plaintiff and against the defendant, and assess his damages in the amount of the installments of War Risk Insurance accruing from and after the 30th of July, 1919, the date of his discharge.

G. H. PACKARD, Foreman."

and the Court being advised in the premises, it hereby specifically finds that the plaintiff has employed Molumby, Busha & Greenan, duly licensed and practicing attorneys, licensed to practice their profession before this Court, the Courts of the State of Montana, and before the United States Supreme Court, [15] to prosecute this action, and finds as a reasonable attorney fee ten percent (10%) of the amount recovered under the contract of insurance to be paid by the United States Veterans' Bureau out of the payments to be made under the judgment and in accordance with law, at a rate not to exceed one-tenth of each of such payments until paid.

WHEREFORE, by virtue of the law, and by reason of the premises, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiff do have and recover of and from the defendant, the United States of America, Fifty-seven and 50/100 Dollars ($57.50) for each and every month elapsing from and after the 30th day of July, 1919, the date on which said plaintiff was discharged from the United States Army, and prior to which date the jury found the plaintiff to be permanently and totally disabled, and up to and in-

cluding the date hereof, and for the further sum of Fifty-seven and 50/100 Dollars ($57.50) per month from and after the date hereof so long as the plaintiff shall remain permanently and totally disabled, and the Court as a part of its judgment, determines and allows as a reasonable attorney fee for the attorneys of the plaintiff, ten percent (10%) of the amount recovered under the contract of insurance and to be paid by the United States Veterans' Bureau out of the payments to be made under the judgment and in accordance with law at a rate not to exceed one-tenth of each of such payments until paid.

Dated: November 1st, 1934.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and Entered Nov. 1, 1934. [16]

Thereafter, on November 1, 1934,

DEFENDANT'S REQUESTED INSTRUCTIONS NOT GIVEN BY THE COURT,

was duly filed herein, in the words and figures following, to-wit: [17]

1. You are instructed to find your verdict for the defendant in this case.

Not given.
C. N. Pray, Judge. [18]

INSTRUCTION NO. 7

You are instructed that vocational training was given to veterans disabled in the service during the World War only after a determination that such veteran was unable to follow the occupation or occupations which he had followed prior to the World War.

Not given.

C. N. Pray, Judge. [19]

9. The burden is on the plaintiff in this case to show with reasonable certainty by a clear preponderance of the evidence that he was totally and permanently disabled while the policy was in force,—that is on or after September 20, 1917, and prior to July 30, 1919, and could not thereafter continuously follow any gainful occupation. It is not enough for him to show that he was temporarily totally disabled at times or that he was permanently partially disabled. If it does not appear by a preponderance of the evidence in this case that the plaintiff became totally and permanently disabled on or between September 20, 1917, and July 30, 1919, your verdict must be for the defendant for these two elements, total disability and permanent disability must concur before plaintiff has a right to recover in this action.

Not given.

C. N. Pray, Judge. [20]

10. In determining whether plaintiff was totally and permanently disabled prior to July 30, 1919, the test is whether he, at that time had a disability

which rendered it impossible for him to follow continuously any substantially gainful occupation, founded upon conditions which then indicated with reasonable certainty that such impairment would continue throughout his life and unless plaintiff has proven by a preponderance of the evidence that prior to July 30, 1919, he had a disability which rendered it impossible for him to follow continuously any substantially gainful occupation and that the conditions were then such as to indicate with reasonable certainty that it would be impossible for him to follow continuously any substantially gainful occupation throughout his life, your verdict must be for the defendant.

Not given.

C. N. Pray, Judge. [21]

15. Whenever a party has by his own declaration, act or omission intentionally and deliberately led another to believe a particular thing to be true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it; and as it appears from the testimony of the plaintiff in this case himself and entirely without contradiction that at the time he applied for his discharge from the United States Army he was asked the following question and gave the following answer in writing, to-wit:

> "Q. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of health,

whether or not incurred in military service?

"A. Yes.

"Q. If so describe the disability stating the nature and kind of wound, injury or disease.

"A. Hearing.

"Q. When was the disability incurred?

"A. Couple months ago.

"Q. Where was the disability incurred?

"A. France.

"Q. State the circumstances, if known, under which the disability was incurred.

"A. Unknown.",

and by such declarations and acts, intentionally and deliberately led the defendant and its officers and agents to believe that he did not then have any reason to believe that he was then suffering from the effects of any wound, injury or disease or have any disability or impairment of health whether or not incurred in the military service, except as stated therein, and thus secured his discharge from said army, he cannot now be permitted to falsify said statement. (Sub-division 3, Section 10, 605, R. C. M., 1921; Section 631, Title 28, U. S. C.)

Not given.

C. N. Pray, Judge. [22]

19. Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and therefore, if a weaker and less satisfactory evidence is offered,

when it appears that stronger and more satisfactory was within the power of the party, the evidence should be viewed with distrust. (Sub-division 6 and 7, Section 10, 672, R. C. M. 1921; Section 631, Title 28, U. S. C.)

Not given.

C. N. Pray, Judge. [23]

14. The vital date in this case is July 30, 1919, and unless you are satisfied by a preponderance of the evidence in this case that on that date the plaintiff Carl F. Noble was wholly unable to follow any substantially gainful occupation and that his condition was then such and of such a nature and founded on such conditions that it was reasonable to suppose and believe that he would be wholly unable to follow any substantially gainful occupation throughout the remainder of his lifetime, your verdict in this case must be for the defendant.

Not given.

C. N. Pray, Judge. [24]

20. A wife cannot be examined against her husband without his consent; nor can a wife, during the marriage or afterwards, be, without the consent of her husband, examined as to any communication made by him to her during the marriage. (Subdivision 1, Section 10, 536, R. C. M. 1921; Section 631, Title 28, U. S. C.)

Not given.

C. N. Pray, Judge. [25]

21. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a

civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. (Sub-division 4, Section 10, 536 R. C. M., 1921; Section 631, Title 28, U. S. C.)

Not given.

C. N. Pray, Judge. [26]

22. You are instructed that the plaintiff in this action is now estopped from claiming that at the time of his discharge from the United States Army he was suffering from the effects of any wound, injury or disease or that he had any disability or impairment of health, whether or not incurred in the military service. (Section 10, 605, R. C. M., 1921; Section 631, Title 28, U. S. C.)

Not given.

C. N. Pray, Judge.

[Endorsed]: Filed Nov. 1, 1934. [27]

Thereafter, on November 1, 1934, Stipulation granting Defendant time for Bill of Exceptions was duly filed herein, in the words and figures following, to-wit: [28]

[Title of Court and Cause.]

DEFENDANT'S STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, acting through their respective counsel of record, that the defend-

ant may have and is hereby granted ninety days from this date in which to prepare, serve and file a bill of exceptions herein;

IT IS FURTHER STIPULATED AND AGREED that an order may be made by the Judge of the above entintled court giving and granting to the defendant ninety days from this date in which to prepare, serve and file a bill of exceptions in the above entitled cause.

Dated this 1st day of November, 1934.

MOLUMBY, BUSHA & GREENAN
Attorneys for the Plaintiff.

JAMES H. BALDWIN
United States Attorney for the District of Montana.

R. LEWIS BROWN
Assistant U. S. Attorney.

FRANCIS J. McGAN
Attorney, Department of Justice
Attorneys for the Defendant.

[Endorsed]: Filed Nov. 1, 1934. [29]

Thereafter, on November 2, 1934, Order Granting Defendant Time for Bill of Exceptions was duly filed herein, in the words and figures following, to-wit: [30]

[Title of Court and Cause.]

ORDER.

Pursuant to the stipulation of the parties hereto, it is ordered and this does order that the defendant above named may have and is hereby granted ninety days from and after the 1st day of November, 1934 in which to prepare, serve and file its bill of exceptions in the above entitled cause.

Dated this 2nd day of November, 1934.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Nov. 2, 1934. [31]

Thereafter, on November 17, 1934, Order extending term was duly filed herein, in the words and figures following, to-wit: [32]

[Title of Court and Cause.]

ORDER.

IT IS HEREBY ORDERED, and this does order, that the term at which the trial of the above-entitled action was had be, and it is, hereby extended to and including the day on which defendant's bill of exceptions is finally settled.

Dated this 17th day of November, 1934.

CHARLES N. PRAY, Judge.

[Endorsed]: Filed Nov. 17, 1934. [33]

Thereafter, on February 12th, 1935, the Bill of Exceptions herein was duly signed, settled and allowed, being in the words and figures following, to wit: [78]

[Title of Court and Cause.]

DEFENDANT'S BILL OF EXCEPTIONS.

BE IT REMEMBERED That this cause was regularly set for trial and came on for trial on Monday, October 29, 1934, in the Court Room of the Court House at Great Falls, Montana, at ten o'clock A. M. of said day before the Honorable C. N. Pray, Judge Presiding sitting with a Jury of twelve, regularly empanelled.

Upon said cause being called for trial, Messrs. Molumby, Busha & Greenan appeared as Counsel for Plaintiff, and J. H. Baldwin, United States District Attorney, R. Lewis Brown, Assistant District Attorney, and F. J. McGan, Attorney for Department of Justice, appeared as Counsel for the Defendant.

All parties announced themselves ready for trial, and thereupon the following proceedings were had and the following evidence [82] introduced, and none other, to-wit.

Whereupon Mr. Busha made the opening statement to the jury.

PLAINTIFF'S CASE.

Mr. MOLUMBY: I would like to call Dr. Porter out of order, so that he may go back to Lewistown.

The COURT: Very well.

Whereupon

E. S. PORTER,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

Q. You may state your name, please?

A. E. S. Porter.

Mr. BALDWIN: At this time, the Defendant objects to the introduction of any testimony in this case upon the grounds and for the reasons following, that the court is without jurisdiction of the person of the defendant.

(2) That the court is without jurisdiction of the subject of the action.

(3) That the defendant cannot without its consent be sued, and it has not consented to be sued in this action.

(4) That the complaint fails to state a cause of action.

(5) That it is not shown by the complaint in this case that the plaintiff has brought himself within the provisions of the statute authorizing the bringing of an action against the defendant in this case. That it appears from the complaint in the case that there has been no denial of any claim made by the plaintiff by the administrator of the veterans administration, and finally that it does not appear on the face of the pleadings in this case that the action was brought within the time within which an action of this kind might be brought.

(Testimony of E. S. Porter.)

The COURT: I will overrule the objection. [83]

Mr. BALDWIN: I will ask an exception.

My name is E. S. Porter. I reside in Lewistown, Montana. My profession is that of a physician and surgeon. I have practiced that profession for twenty-four years. I practiced my profession during those years at the St. Luke Hospital, Denver; Kansas City Hospital, Kansas City, Missouri; United States Army.

Mr. MOLUMBY: May the records show that Counsel for the government admits the qualifications of the Doctor.

Mr. BROWN: That is correct.

WITNESS continues: I was in the army during the war.

Q. Were you a member of the medical corps of the United States Army during that time?

A. Yes.

Mr. BALDWIN: We object to this line of examination as immaterial unless he had some contact with the plaintiff in this case during that period.

The COURT: It is simply an additional qualification.

Mr. MOLUMBY: That is all.

Q. Where were you stationed while in the army?

A. At Fort Riley Hospital, for the ruptured and crippled in New York City; Camp Joseph B. Johnson, Florida; U. S. General Hospital 49, Fort Snelling. I am acquainted with Carl Noble. I have examined him in my professional capacity. I can give

(Testimony of E. S. Porter.)

you the date on which I examined him, it was February 19, 1923.

Q. Will you state to the jury what you found upon your examination of him?

Mr. BALDWIN: I object to this as incompetent, irrelevant and immaterial; too remote.

The COURT: Well, I suppose he has not been able,—at least, he has [84] said he wanted to take the Doctor out of order. I presume he will connect it up with the proof in some way.

Mr. BALDWIN: We merely want to save the record in the event he does not.

The COURT: I will overrule the objection with that understanding.

Mr. BALDWIN: Note an exception.

Q. Will you now, Doctor, answer the question if you recall. The question was: Will you state to the jury what you found upon your examination of him?

A. He was suffering from heart trouble. I will recount more in detail the way it manifested itself. He came in suffering with pain in the left chest; shortness of breath, palpitation, weakness, fatigue, inability to carry on his occupation. I gave him a complete medical examination at that time. As to what it disclosed with reference to his heart trouble, his heart at that time was incompetent, that is, he was unable, in my opinion at that time to carry on.

Mr. BALDWIN: We move to strike the answer as not being responsive.

The COURT: Yes, it is not responsive.

(Testimony of E. S. Porter.)

Q. What do you mean by incompetent, with reference to his heart?

A. The heart was unable to respond to ordinary exertion in the normal manner. That is, ordinary exertion would bring on this pain and shortness of breath and palpitation, weakness. I think I diagnosed his case at that time as valvular heart disease. As to what, if anything, I noticed at that time with reference to his nervous condition, I will say that he was very apprehensive. I will explain to the jury what I mean, he was afraid he was going to die. As to what if anything, that indicates with reference to his nervous condition, it indicated to my mind that he was extremely nervous. As to whether I noted anything else with reference to [85] his nervous condition at that time, he had a coarse tremor in his hands at that time.

Q. Did he give you any history at that time of the case, as you recall?

A. As I recall he said that he had——

Mr. BALDWIN: I object to that as not responsive, I think that calls for a yes or no answer.

The COURT: Sustain the objection.

Q. Will you answer that question yes or no, Doctor?

A. Yes sir.

Q. State what history he gave you upon his case at that time?

Mr. BALDWIN: We object to that as hearsay, and too remote, and not a statement that was made

(Testimony of E. S. Porter.)

by the patient for the purpose of treatment by the Doctor, but for examination purposes only.

Mr. MOLUMBY: I will withdraw the question at this time. Doctor, did he come in to you for treatment at that time, or for what purpose?

A. He came in for treatment.

Q. Now, I will ask you what the history of the case was that he gave you at that time?

Mr. BROWN: We object to it as hearsay and too remote.

The COURT: Overrule the objection.

A. He gave a history of mumps, followed by involvement of the testicles. I believe he said he had been gassed, and before his discharge in 1919 that he had influenza. As to what treatment or advice I gave him with reference to treatment at that time I will say that I gave him no treatment; I advised him to go to Fort Harrison. Fort Harrison is a United States Veterans Hospital at Fort Harrison. That is a Hospital that the Government maintains for the care of disabled soldiers. The condition that [86] I found upon my examination was of such a nature as to be permanent, in the sense that it was reasonable at that time to suppose that it would exist throughout the rest of his life.

Q. Was the condition that you found at that time totally disabling in the sense that it would prevent him from following a substantially gainful occupation, defining the term "Total" as not meaning complete helplessness, or a disability that

(Testimony of E. S. Porter.)

would prevent him from working at times, it not being total if he was able to work continuously and regularly, but if he was able to work only spasmodically it still might be total, but if his disability was of such a nature as to prevent his working with a reasonable degree of regularity, but if the condition was of such a nature as to make work injurious to his health, or would endanger his health or life, then it would still be total. Having that definition and explanation of the term total in mind, state whether or not he was totally disabled at that time.

A. Yes.

Cross Examination by Mr. Brown:

I say that he came into my office for treatment. As to how often I treated him, I will say that I did not treat him. I did not know Noble prior to the time in February that he came into my office. I had not been acquainted with him at all; I did not know him. I stated that when he came in he was suffering pain in the left chest. As to whether I based my statement as to that on what he told me, I will say on the subjective symptoms, yes. I stated that I found that he was extremely nervous because he was afraid he was going to die. He told me that. As to whether I based my opinion as to his nervous condition upon the statements that he made to me, I will say, no, I based his apprehension upon what he told me. I did not base my conclusion as to his [87] nervous condition upon his apprehension.

(Testimony of E. S. Porter.)

At that time I did make tests of the reflexes. I made tests of the tremors and tests as to the extension of the fingers.

A. Extension of the fingers?

Q. Yes.

Q. What do you mean?

A. By the patient, having him hold his hand.

A. That is the test for tremor. I stated I found he was suffering from heart trouble at that time. I never saw him after that one examination.

Q. At that time you gave your prognosis as unfavorable, isn't that true?

A. Never saw him professionally.

Q. That is what I mean. You never saw him professionally?

A. No sir.

Q. You have described, Doctor, in your direct examination all you found wrong with Noble?

A. I answered all the questions correctly, yes.

Redirect Examination by Mr. Molumby:

Q. I don't know whether you answered Counsel's preceding question. He asked you if you had made the prognosis at that time, that his prognosis was unfavorable?

A. I did.

Q. What did you mean by that?

A. That was my opinion that he would continue to progressively get worse.

Q. Do you think of anything else that you discovered in his condition now, that you did not mention previously?

(Testimony of E. S. Porter.)

A. No, I don't think so.

Recross Examination by Mr. Brown: [88]

I mean by prognosis "Unfavorable". That his condition would continue to get worse. That was the opinion that I had after this examination that I made of him in February, 1923.

Witness Excused.

Mr. MOLUMBY: If the court please, I might state to the court at this time that a deposition was taken of the Plaintiff in the Hospital at Helena some time ago, I have forgotten, it was about a year ago according to my memory. The deposition was supposed to be forwarded to the Clerk. I would like to inquire of the Clerk if he has the deposition of Carl Noble, forwarded to him by the Notary Public taking the deposition.

The CLERK: Yes, we have.

Mr. MOLUMBY: May it now, by order of the court, be opened in open court.

The COURT: Very well. Are you going to show that the plaintiff will not be able to be present?

Mr. MOLUMBY: Yes.

Mr. BALDWIN: We shall object to any examination concerning why he is not able to be here. We admit that he is not able to be here.

The COURT: Very well, the deposition then may be opened.

Mr. MOLUMBY: The following is the deposition taken of Carl F. Noble and reads as follows:

Mr. BROWN: The stipulation is not part of the deposition and we object to its being read.

Mr. MOLUMBY: I will not read it.

The COURT: Very well.

Whereupon the

DEPOSITION OF CARL F. NOBLE

was read to the jury, and is in words and figures as follows to-wit: [89]

[Title of Court and Cause.]

DEPOSITION.

BE IT REMEMBERED that pursuant to a Stipulation hereto attached on the 2nd day of June, 1933 at Fort Harrison, Lewis and Clark County, State of Montana, before me, Arthur K. Serumgard, Notary Public in and for the State of Montana, County of Lewis and Clark, duly appointed to administer oaths, personally appeared Carl F. Noble, a witness produced on behalf of the Plaintiff in the above entitled action now pending in said Court, who, being by me first duly sworn, was then and there examined and interrogated by Loy J. Molumby, Attorney for the Plaintiff, and D. D. Evans, Chief Attorney, Veterans Administration, representing the Defendant, and the following proceedings were had:

(Deposition of Carl F. Noble.)

Direct Examination by Loy J. Molumby:

Q. Your name is Carl F. Noble, is it not?

A. Yes.

Q. How old are you?

A. I am 45.

Q. Where is your home?

A. Grass Range, Montana.

Q. That is in Fergus County?

A. Yes.

Q. Did you serve in the World War in the United States Army?

A. Yes, I did.

Q. I will show you what I have marked for purposes of identification Plaintiff's Exhibit No. 1, and ask you what that is?

A. That is my discharge from the army.

Q. It was given to you when you were discharged from the army, [90] was it?

A. Yes.

Q. We will offer Plaintiff's Exhibit No. 1, being the discharge of the Plaintiff from the United States Army, as a portion of the deposition.

Mr. EVANS: There is no objection, and it may be stipulated that the discharge may be copied and the original, which is apparently authentic, returned to Mr. Noble by the Notary Public.

Q. You were discharged, were you not, at Fort D. A. Russel, Wyoming, as shown by Exhibit No. 1?

A. Yes.

(Deposition of Carl F. Noble.)

Q. Do you recall, Mr. Noble, demanding of the United States Government the benefits of your war risk insurance policy?

A. Yes, I remember asking for it.

Q. How did you do that? By letter?

A. Yes.

Q. Do you recall the date of it?

A. I believe it was January 22, 1931.

Q. I will ask the Attorney for the Defendant if he has such a letter as a portion of the war risk insurance file of the Plaintiff, to produce the same.

(Attorney for Defendant produces letter of January 22, 1931)

Q. This letter produced, bearing date of January 22, 1931, was that signed by yourself?

A. Yes.

Q. I will offer Plaintiff's Exhibit No. 2 in evidence as a portion of the deposition of Carl F. Noble, and ask that it be attached to said deposition as Plaintiff's Exhibit No. 2.

Mr. EVANS: To which offer there is no objection, and it is further stipulated that the Exhibit No. 2 is in the handwriting and acknowledged to be signed by the Plaintiff, and that it may be withdrawn and a copy made by the Notary Public and the original returned to the files of the Defendant.

Mr. MOLUMBY: To which stipulation I agree.

[91]

Mr. BALDWIN: We object to the reading of that Exhibit on the ground and for the reason that it purports to be a writing signed by one acting

(Deposition of Carl F. Noble.)

without authority, a Director of the Veterans Bureau, not by the Administrator of the Veterans Bureau. We object to it as incompetent, irrelevant, and immaterial.

Mr. MOLUMBY: It is not now too late to raise that objection on the ground that Mr. Evans said he had no objection.

Mr. BALDWIN: We have a right to save the objection.

The COURT: I will overrule the objection.

Mr. BALDWIN: Exception noted.

Q. Carl, when you first enlisted, where, if any place, were you sent for training?

A. When I first enlisted I was sent to Spokane, Washington.

Q. From there where were you sent?

A. To Gettysburg, Pennsylvania.

Q. What is the camp at Gettysburg?

A. Camp Gettysburg, I believe.

Q. From that camp where were you sent?

A. To Camp Green, Charlotte, North Carolina.

Q. Is that a point of embarkation?

A. No, that is a large training camp.

Q. From that camp where were you sent?

A. To Camp Merritt, New Jersey.

Q. Did you subsequently go overseas?

A. Yes.

Q. From Camp Merritt?

A. From Camp Merritt by way of Hoboken.

(Deposition of Carl F. Noble.)

Q. While in the camps in this country did you have any physical trouble?

A. Yes.

Q. Just state what and where they occurred?

A. The first I recall I was on the train going from Gettysburg to Camp Green.

Q. What was the nature of that sickness? [92]

A. I was nauseated, vomitted, had diarrhea, and was dizzy, and after we got to camp we slept in the pup tents the first night and I vomitted all night. I had to go to the latrine several times. The next morning I went on sick report. Then I went to the infirmary, was examined and marked "duty".

Q. Did you then do duty?

A. Yes. That forenoon I went and laid down on my bunk and that afternoon on formation drill I came near fainting and went and sat down, and one of the drill sergeants told me to get back into line or he would wind a rifle around my neck, and I told him to start winding. The first sergeant came around and wanted to know what the trouble was. I started to explain to him and he looked at me and said: "Sergeant, that man is sick", and he detailed Corporal Hamilton and a private to take we over to the infirmary. I was taken over to the infirmary, given an examination, sent back to the company, and marked "duty".

Q. Were you then compelled to do duty?

A. Not that afternoon.

Q. How soon thereafter?

(Deposition of Carl F. Noble.)

A. I was sick the next morning, but I was marked "duty" and tried to do duty. In a few days I was alright. I made two or three more trips over there.

Q. The first night during your sickness did you have any assistance from any of the men?

A. Nothing more than for Corporal Collins getting me some water, something like that.

Q. Who was Corporal Collins?

A. He was the Corporal of the squad I was in.

Q. Did he give you any directions about staying in your bed?

A. He told me to lay down and stay there and keep quiet. [93]

Q. Mr. Noble, after going back on duty, how long did you remain sick while on duty?

A. It must have been three or four days when I was sick.

Q. During that time did you attempt to do the full duty of drilling?

A. No, I couldn't do the full duty.

Q. At the end of these three or four days were you back in such shape as to be able to do duty?

A. Yes.

Q. Subsequently, Carl, did you again have any sickness while at Camp Green?

A. Yes.

Q. What was the nature of that sickness?

A. I had the mumps.

(Deposition of Carl F. Noble.)

Q. Just describe your condition while you had the mumps.

A. There had been considerable amount of mumps around the camp and one morning I felt a swelling to my jaws, and my jaws started to lock at times, and I went over to the infirmary on sick report one morning and when it came my turn to stand up before the doctor he asked what my trouble was and I told him I had the mumps, and he asked me who told me that I had the mumps and I told him it wasn't nobody, I just knew I had them. He said I didn't know any such damn thing.

Q. What if anything, did he do?

A. I was marked "duty" and sent back to the camp.

Q. Did you, while you had the mumps, attempt to do duty?

A. No, not then. I went over to the infirmary that afternoon again. There was two doctors examined me in the afternoon.

Q. Different doctors than the one in the morning?

A. The first doctor that examined me in the morning and another.

Q. What did they do?

A. They decided there was nothing wrong with me, and the next morning I went over again. That morning they was getting rather impatient and the first doctor told the sergeant there to give [94] me about two-third of a glass of castor oil. He said that

(Deposition of Carl F. Noble.)

was good medicine for me and gave me castor oil and marked me "duty".

Q. Did you then report?

A. I went back to the camp and told the first sergeant what they told me, and he told me they couldn't have me hanging around the camp street all the time and to go down to the stable sergeants tent and hide out. I was lying around on the stable sergeants bunk and he come in and says: "Noble, there has been a couple of medical men through here and these ditches around the corral are not sanitary and they have to be drained immediately." He said, "There is no non-commissioned officer around here except you and I wish you would go out and kind of take charge of having them ditches cleaned out". There was about 25 or 30 wagoners and privates working there and these doctors or medical men came back to see how the work was progressing. I was leaning on a shovel and Major Williams called out: "Say, you, over there. Are you afraid you will bust the shovel?" I told him I wasn't afraid of it. He then told me to get to work and I told him that I was sick. He said, "Young man, you are the luckiest soldier in the army. It is our business to look after the sick people." He says: "What is your trouble?" I told him I had the mumps. The other doctor with him was the one I had been going over to see. He spoke to him in an undertone. They came up and looked me over a little and they says: "A little touch of quinzy." They says: "You are

(Deposition of Carl F. Noble.)

not too sick to work. Get to using that shovel." I replied: "I am the non-commissioned officer in charge of this detail." He then asked me where my chevrons were. I told him I had never been issued any and he said: "Do you mean to say you are a non-commissioned officer"? I said, "Yes, sir". He said: "Then you are not supposed to do any work, but the next time we'll see you [95] with them chevrons on." The next morning the mumps were down on me. I went over to the infirmary and the doctor says: "What is it this time," or something like that. I told him I had been over four or five days complaining about the mumps and told him this time I had the proof that I had them. He examined me and asked me if I had been injured. I told him I hadn't. "You have had the mumps, but you are over with them now," and marked me "Duty." When I was in that condition I had to carry my entire equipment about two miles.

Q. Was that on march?

A. When we went to take the train to Camp Merrit, to entrain.

Q. Carl, you used the expression, the mumps "had gone down" on you. Had you at that time a swelling in the groin?

A. Yes.

Q. And soreness in the groin?

A. Yes.

Q. Was your jaw still swollen?

A. I believe it went down that morning or during the night.

(Deposition of Carl F. Noble.)

Q. Your pack and equipment you had to carry while on the two-mile march to entrain for Camp Merrit, just describe the weight of the pack and equipment you had to carry.

A. I have been told a soldier's marching equipment amounts to 73 pounds. Whatever the full equipment weighs I had.

Q. Did you then entrain for Camp Merrit.

A. Yes, we got on the train for Camp Merrit.

Q. When you got to Camp Merrit what condition were you in?

A. I was in about the same condition. The berth was made up for me at Camp Green and I laid down on my back all the way from Camp Green to Camp Merrit. We were on the train two days.

Q. After you arrived at Camp Merrit what, if anything, was done with you about your physical condition?

A. I went over to the barracks and went to bed, and the next [96] day there was some inspection officer come in there and they called us to attention and I didn't get on my feet very quick and they bawled me out for not coming to attention the way I should. I explained to them my condition and showed them my condition and I was taken before a doctor and I believe I was marked "Quarters".

Q. Did you remain in your quarters there for some days?

A. Yes. We were also under quarantine on account of some disease at the same time in the barracks.

(Deposition of Carl F. Noble.)

Q. How long did you remain in bed?

A. Perhaps two days.

Q. Then you were able to get up and be around?

A. Yes. I got up and got around. I didn't have nothing to do. We were under quarantine.

Q. For how long a period?

A. I couldn't say exactly. It was until we were ready to leave for France and the quarantine was lifted.

Q. After quarantine was lifted, did you then shortly after go overseas?

A. Yes. We went to Hoboken and boarded the ship.

Q. When was that?

A. That was about the 16th of April, 1918.

Q. On your way overseas did you get so that you were completely recovered from the attack of the mumps?

A. I never got completely recovered I don't believe, but I got around pretty good.

Q. After getting overseas did you again have a period of sickness?

A. I was seasick on the ship.

Q. Before going overseas did you ever apply for war risk insurance?

A. Yes.

Q. For what amount?

A. For $10,000.00. [97]

Q. Who did you name as beneficiary of the insurance?

(Deposition of Carl F. Noble.)

A. My brother, Purdy Noble, for $5,000.00, and my sister Lily Noble, $5,000.00.

Q. Have you ever exchanged the beneficiary of that insurance?

A. No, but I would like to.

Q. Where was this that you applied for the insurance?

A. At Camp Green, February 1, 1918.

Q. From that date on were the premiums on your insurance deducted from your pay?

A. They were.

Q. And up to and including the month of what?

A. Until after my discharge, including the month of August, 1919.

Q. Carl, when you got overseas, what outfit were you in?

A. In the supply company, 60th infantry.

Q. What division?

A. 5th Division.

Q. Was the 5th Division a regular army division or a national guard or draft outfit?

A. Regular army.

Q. Did you participate in all the engagements with the 60th Infantry from that time on until after the Armistice?

A. I did.

Q. In what engagements, if any, was it that you first became ill?

A. I was in the St. Mihiel.

Q. What occurred at that time?

(Deposition of Carl F. Noble.)

A. I was gassed at that time. That was in September, about the 14th I believe, when I was gassed.

Q. What type of gas did you encounter.

A. I couldn't tell. There are so many kinds of gas. I don't know much about this gas. I know that I was very near exhausted. I had been out for about 48 hours and they had a special gas guard for me to see that I had my mask on when gas showed up because I was so dead for sleep I didn't pay attention to the gas [98] and it was his business to reach out and feel that I had the respirator on properly. He had his feet on my ribs all night long it seemed to me. The next day I was vomitting, was sick and had diarrhea.

Q. How long were you sick from this gassing?

A. I was sick and sore in the chest for a week, maybe ten days.

Q. Did you thereafter encounter any other gas?

A. Yes.

Q. Where was that?

A. In the Argonne.

Q. Was that the same type of gas you ran into before?

A. I couldn't say. There was various types of gas, and I was gassed several times. Some of it seemed like pepper, and other seemed to cut a person's throat deep in the chest. I was in charge of this wagon train and had to get the animals out of the gas area. I couldn't put on my mask because I couldn't see with the mask on. I had to go with the

(Deposition of Carl F. Noble.)

mask off. I vomitted frequently for several days and had diarrhea even after the Armistice.

Q. How long before the Armistice was it that you encountered this gas?

A. About the middle of October. The first we encountered in the Argonne and we were gassed off and on until the Armistice. We went in there in October 6 or 11th, something like that and never was relieved. We were in the fighting area all the time.

Q. Subsequent to the Armistice, Carl, did your outfit go up as a part of the army of occupation into Germany?

A. It did.

Q. What part of Germany did you go into?

A. We was in Luxemberg.

Q. While at Luxemberg did you have another period of sickness?

A. Yes.

Q. What was the nature of that sickness? [99]

A. I believe it was the flu.

Q. Just describe what occurred.

A. I had headache, chills, was nauseated, and I was sick for several days. Captain Wilson came down to the corral and asked what had happened to me. I told him I was sick, and he asked me if I had been to the infirmary. I told him that I hadn't, and he told me to go to the infirmary. The next morning he asked me what they said. I told him I hadn't been there, and he told me again to go, and

(Deposition of Carl F. Noble.)

come back to find out if I had been sent to the hospital or what my condition was, and when he seen me he asked me what they said. I told him I hadn't been over and he told me that he was ordering me to go this time and if I didn't go, he would prefer court martial charges against me for disobeying orders. I went up to the supply company and was taken down to the infirmary and my name was put on sick call and I believe I was given some pills, although my temperature was not taken. I was marked "duty". The Captain come down to the corral after dinner and seemed rather surprised to see me and wanted to know if I had been to the infirmary. I told him I had and what they told me, and he cursed the medical officers down there terrible, and put me to bed. He detailed a wagoner and Palmeteer to look after my duties and I believe Wagoner Willinburg to see that I got rations, something to eat, that I was sick.

Q. How long were you laid up?

A. I was laid up four or five days, I expect, in bed.

Q. When was this? What month?

A. I believe it was in December. It might possibly have been January. It was in December, 1918 or January, 1919. We was in the City of Esch at Luxemberg at that time.

Q. After you got back up on your feet, were you well? [100]

A. No, I was weak and seemed a long time getting my strength.

(Deposition of Carl F. Noble.)

Q. When did you come back from overseas?

A. On July 13, 1919.

Q. Until you left for overseas had you recovered sufficiently so that you could go out and do regular duties of a soldier?

A. Not the duties I had done before. I was short of breath and got fatigued quicker than I did.

Q. When you came back on the boat were you in that same condition?

A. I was.

Q. What was your condition after you got back to this country the few days remaining between the time you arrived in this country and the time of your discharge?

A. About the same.

Q. Just state generally what your condition was and describe it during that period after you arrived in this country.

A. I was rather nervous, soft, couldn't stand much exertion. I nfact I hadn't been doing a great deal of exertion.

Q. What about the continuance of your dizzy spells?

A. I wasn't bothered.

Q. When you exerted yourself during that period, what effect, if any, did it have upon your ability to breathe?

A. I was short of breath and the veins in my neck would throb and my ears would throb and I would have palpitation.

(Deposition of Carl F. Noble.)

Q. How about your weight during this period. How did it compare with your weight when you first went into the army?

A. Very little difference.

Q. You were about the same when discharged as when you first went in?

A. As near as I can remember.

Q. What was your normal weight during those days?

A. Around 150 pounds. [101]

Q. How tall are you?

A. 5 feet, 6 and ¾ I believe.

Q. How old were you when you enlisted?

A. 29 years and 5 months.

Q. Where were you discharged? What camp?

A. At Fort D. A. Russell, Wyoming.

Q. When you came out for discharge, what, if any, medical examination did they make?

A. We was lined up and walked past the doctors. I believe they put these here listeners on us two or three places and then they took up the next man.

Q. Did they give you any through physical examination?

A. No.

Q. Did they ask any questions about whether you were sick?

A. I don't believe they did as to a person being sick.

Q. Did you tell them at all you were sick?

A. I didn't.

(Deposition of Carl F. Noble.)

Q. Why not?

A. I wanted to get out.

Q. After discharge where did you first go?

A. I went home.

Q. To Grass Range?

A. To Grass Range, Montana.

Q. When you got home what was your physical condition?

A. I was very nervous and I was more short of breath than I had been when I first got back. I quit drinking coffee, and quit cigarettes, thinking perhaps that was giving me some heart trouble.

Q. Prior to going into the army what was your occupation?

A. I was a farmer.

Q. After you came back from the army were you able to go ahead and do the farm work?

A. Not the work I had done before I went into the army.

Q. Were you able to get out and plow?

A. Yes. That was where I first noticed one of my serious troubles. That fall I was plowing and would find myself rigid and stiff [102] on the plow. I would relax and before I would go thirty rods I would be the same condition, just as tight as a fiddle string.

Q. When you first got back from the army were you able to do all the work on the farm that spring in putting in your crop?

A. No. I had to have help.

(Deposition of Carl F. Noble.)

Q. Who helped you put in the crops that spring?

A. My brother.

Q. How big a crop did you put in?

A. We put in the usual crop that we had been putting in. I don't remember how big, close to 300 acres. Some of that had already been put in the fall before. It was fall wheat. He had a good deal of the ground ready when I came home from the war.

Q. What work were you able to do that spring, if any?

A. I done plowing and seeding, but no manual work. He done the heavy work.

Q. Were you able to do the heavy work?

A. I was sick that spring and I didn't get started until two weeks after he was working.

Q. How often would your work be interrupted by sickness that spring?

A. It wasn't interrupted much after I got started. I had these here pains in my chest and dizzy spells, palpitation, and was weak, and I started to work and quit and rested up again and went at it and after about two weeks I went ahead and we finished putting in the crop.

Q. That was in the spring of 1920?

A. Yes.

Q. You got back in July, 1919?

A. Yes.

Q. The crop was all in when you got back? [103]

A. He was harvesting it and a good deal of the ground was already prepared for winter wheat.

(Deposition of Carl F. Noble.)

Q. Were you able to do the harvesting that summer?

A. It was about finished. I might have had a little to do. There was not much harvesting to do that year.

Q. Did you do any work that fall?

A. Yes I done some work that fall.

Q. Is that the work you described as plowing?

A. Yes, when I noticed I would be tense and couldn't relax.

Q. Would the period when you would be able to work that fall in plowing be interrupted by sickness?

A. It would be interrupted by sleepless nights. My heart would get to palpitating and the bed would shake, and when I wouldn't work I wasn't troubled much.

Q. Just describe your condition after you had been working a day during that time how you would be at night.

A. I would be restless and my heart would pound and I could feel the bed shake. After I had gone to sleep I would have these nightmares, troubled dreams. Most of them were connected up with hearing men hollering. These fellows had liquid fire on them and were hollering. I would want the fire put out. I imagined I had it on myself sometime.

Q. Did you ever encounter any liquid fire?

A. Not personally. I never got any.

Q. After a night of that kind were you able to work the next day?

(Deposition of Carl F. Noble.)

A. Yes, I guess so, but the next night it would be worse. I quit in the best weather we had and just done nothing when I should have been working. I just turned my stock out and done nothing. [104]

Q. Then the next working season in the spring of 1920, did you put in your crop that year?

A. With the help of my brother.

Q. Were you able to do the heavy work that spring?

A. No. My brother done the heavy work. I done the easiest of the work.

Q. Were you able to do even the easy part of the work continuously, or was it interrupted?

A. I done it, yes. We done considerable day hiring, that is, hiring a fellow a few days at a time.

Q. Why?

A. I wasn't able to go ahead with the heavy work. I was picking out the easy jobs.

Q. Were you in such physical condition that you could conduct your ranch at that time?

A. No, that is, I couldn't do it myself.

Q. Prior to the time you went into the war were you able to put in your crops such as you were putting in those years with the help of this brother?

A. Yes.

Q. Had you put in crops of that kind?

A. Yes.

Q. Before the war?

A. Yes.

Q. Did you do it without help?

(Deposition of Carl F. Noble.)

A. I had help part of the time, but this help I had was clearing the land of the stones.

Q. Then did this brother ever help at that time?

A. As far as putting in the crop.

Q. Were you able to do it alone before entering the army?

A. Yes, in fact I didn't have teams. I had to do it myself. I didn't have the equipment to hire extra help.

Q. How long did this condition last? Did you recover from that [105] at all, or did it get worse?

A. I recovered. I got to feeling pretty good and then I had one of the neighbors come in and help to do the summer fallowing. My brother was figuring on taking on the lease land we had and farm it for himself. I was taking just the land I owned up until that time. We had been farming the entire amount of this land every year. In the summer of 1920 my brother decided he would take this lease land and farm it while I would farm my own for the crop of 1921. I hired Roy Bigler to do a good deal of the plowing. I paid him $137.00.

Q. Why did you do that?

A. To get him to do the work so I wouldn't have to do it. I was unable to do it.

Q. Then after the plowing was done did you get the crop in?

A. Yes.

Q. Did you put that in yourself?

A. I believe I did.

(Deposition of Carl F. Noble.)

Q. Did you have any help?

A. I don't recollect that I did. I put in winter wheat, at least most of it was winter wheat. That was the fall of '20. I had only about 40 acres to put in in the spring of '21.

Q. What was your condition during that year of 1920 to the spring of 1921?

A. It wasn't as good as it had been. I was up and around awhile in the spring.

Q. Did you still have this dizziness and shortness of breath?

A. I had pains in the left chest, palpitation and was still rigid. I would find myself gripping my teeth together.

Q. When did you get married, Carl?

A. In April, 1928. [106]

Q. In the year 1921 what was your condition and the ability to work?

A. About the same as it had been in 1920. I was rigid and nervous and had upon exertion shortness of breath and at times would get light headed and dizzy.

Q. Did you have to have help in putting in the crop of 1921?

A. I had about 40 acres to put in that spring. My brother was batching with me, but we farmed separately. I had about 40 acres to seed. I had no plowing to do.

Q. All you had to do that spring was put in that 40 acres of seed?

A. Yes.

(Deposition of Carl F. Noble.)

Q. When it came to harvesting the crop of 1921 were you in the same condition?

A. I was in the same condition and hired the harvesting done.

Q. In 1922 what did you do if anything, with reference to putting in your crop?

A. I put in 40 or 50 acres of crop that had been already prepared. I seeded it and that is all I done in the spring of '22. I done nothing since.

Q. Had your health been different, would you have put in more of a crop in 1922 than you did?

A. No. I wouldn't have put in any more irregardless of my health. I was summer fallowing and raising better crops than I did when I had bigger acreage and it cost me less than to have this done and done good than to have somebody go over all this ground, and I wasn't able to do it myself and any way I don't know as I would have as I had this other system of farming.

Q. From 1922 on have you done any work at all?

A. No work only lounging around the house helping get some meals, or getting some meals, but I have done no farm work. [107]

Q. From 1922 on you have been in hospitals a great deal of the time, have you not?

A. Yes. I have.

Q. What hospitals have you been in?

A. The first hospital was the Deaconess in Great Falls and the other hospitals have been the Government hospitals in Helena and St. Paul, and I was in the hospital at Lewistown.

(Deposition of Carl F. Noble.)

Q. How frequently have you been in hospitals since 1922?

A. I wouldn't say that I had been there frequent. I come to the Government hospital in 1923 in Helena. I was here about six weeks I guess. I went home in June. I believe it was May. Then in February I was sent to St. Paul and was in bed 13 or 14 months.

Q. What hospital?

A. Aberdeen. The Veterans Bureau Hospital. Then I don't believe I was in the hospital again until 1931, when I was up here to Helena for about six or seven weeks. That was in the spring of 1931, and in the spring of 1932 I was up to Helena for a few weeks and this spring again in 1933 I was in. It has been only in the spring when I was in the hospitals.

Q. This long period of hospitalization in St. Paul you say started when?

A. It started in February, 1924.

Q. You were there for——

A. Until April, 1925.

Q. From 1925 up until 1931 were you able to do any farm work or any work of any kind?

A. No.

Q. Has that been true ever since 1922?

A. Yes. Just the same.

Q. How long have you been in the hospital now?

[108]

(Deposition of Carl F. Noble.)

A. I went to a hospital I believe about the middle of March in Lewistown,—I couldn't say—some time in March I believe, and have been in hospital ever since.

Q. During the periods of that time when you have not been in the hospital have you received medical attention from various doctors?

A. Yes.

Q. What doctors?

A. Dr. Freed of Grass Range and Dr. Attix of Lewistown, and Dr. Wallin of Lewistown. I went to see Dr. Porter before I applied for any compensation. That was the only time I ever saw Dr. Porter and he advised me to apply for treatment.

Q. Have you received from the druggists other than that prescribed by a doctor?

A. I have received medicine from a druggist ever since 1919. Since November, 1919.

Q. You also were treated and operated on by the clinic in Great Falls?

A. Yes, I was.

Q. How long were you in the hospital that period?

A. I believe it was three weeks. That was in June or July, 1922. I was there the 4th of July I am sure.

Q. That is all. You may cross examine.

Cross Examination by D. D. Evans:

Q. Did you have the flu in Luxemberg?

A. I did.

(Deposition of Carl F. Noble.)

Q. How long?

A. I expect ten days or two weeks, that is, that I was sick.

Q. When you were discharged the doctors, you stated in your direct examination, put some instrument to your chest and listened, did they not?

A. I believe they did. [109]

Q. Did you notice whether a doctor put a stethoscope or instrument over your heart and listened at that time?

A. I do not know where they put it. They was listening to everybody and everybody got the same treatment.

Q. You do remember they had a stethoscope?

A. I think so.

Q. How large a farm did you have at the time the war ended, Mr. Noble?

A. There were 860 acres altogether; 400 acres was my own.

Q. Of this 860 acres total how much was cultivated land?

A. Well, there was about 200 acres on my own place that was cultivable and there was about 120, I believe, on the rest of it.

Q. What did you raise mostly?

A. Raised wheat. I had some cattle, about 14 or 15 head.

Q. What was your practice as to summer fallowing. How much of this ground did you summer fallow in 1919, 1920, 1921, and 1922?

(Deposition of Carl F. Noble.)

A. There was very little fallowed. I believe there was a piece of about 15 acres summer fallowed in 1919, but after 1921 the 200 acres on my places was split up. I only farmed 100 acres each year and summer fallowed 100 acres.

Q. Do you remember what your yield was from this 100 acres in 1920, 1921?

A. I really don't know, but I do know what it was in 1923.

Q. What was it in 1923?

A. Over 5000 bushels, I should say about 5300 bushels.

Q. What was wheat worth at that time?

A. It was worth about $1.00 a bushel.

Q. Since 1923 have you still continued to own that 200 acres? [110]

A. Yes.

Q. You haven't done the work on it, but you have had it farmed under your supervision?

A. Yes.

Q. Have you continued that practice of summer fallowing of about 100 acres?

A. I have until the last two years.

Q. What happened the last two years?

A. I have put it all in.

Q. How have the bushel returns been. I don't mean in regard to the price?

A. We haven't been getting no crops at all. Two years ago I thrashed all bushels; that was in 1931. Last year I thrashed 850 bushels.

(Deposition of Carl F. Noble.)

Q. That is all off the whole 200 acres?

A. I have got 640 acres of my own.

Q. You bought some land since?

A. Yes.

Q. How much crop land?

A. Just about the same. The 200 acres of good farm land, I let some of the cultivated land go back on the original.

Q. In 1919 and 1920 how much stock did you own?

A. I let my brother have what cattle I had in the fall of 1920 because I didn't feel able to take care of them. There were about 14 or 15 head and I sold them to him.

Q. How many work horses did you have in 1919 and 1920?

A. I couldn't say as to that. I had 8, maybe 12.

Q. How many did you customarily work at that time?

A. We worked 8 on the plow.

Q. Did you have enough harness and horses to handle two outfits?

A. Not 8-horse outfits,—an eight and a four.

Q. You had then enough horses and so forth to set up 12 head of [111] horses for work on the farm?

A. Yes.

Q. You had farm machinery for your needs?

A. Yes.

(Deposition of Carl F. Noble.)

Q. Did you have any other stock except the horses and cattle, the cattle having been sold in the fall of 1920?

A. I usually had two or three hogs.

Q. You never handled sheep?

A. No sheep.

Q. I suppose a few chickens and that sort of thing?

A. Yes.

Q. Your main dependence in your farming operations was your wheat?

A. Yes.

Q. How was your average crop from 1923 until 1928 or 1929, when you said you had very poor results?

A. We had average crops,—I didn't say,—20 bushels or such a matter. If it fell below 20 bushels, I felt I wasn't getting much.

Q. To the acre?

A. Yes.

Q. How did it average up with the farmers adjoining you?

A. Away ahead of them.

Q. Was that because of their failure to use your modern farming methods? Or were they less skillful than you in farming?

A. They didn't use the right system.

Q. You used the same system and lived on the farm all these years, directing the operations?

A. Yes.

Q. What doctor did you first consult and when?

(Deposition of Carl F. Noble.)

A. The first actual doctor I consulted was Dr. Larson, I believe, in June, 1922, but I had been going to the druggist, Gillespie. At this time he told me I had appendicitis and I had better go up and have Dr. Larson give me an examination and operate if necessary.

Q. Gillespie is the druggist at Grass Range?

A. Yes. [112]

Q. What month in 1922 was that you saw Larson?

A. I believe that was in June or July.

Q. You first made claim to the Veterans Bureau in 1923?

A. Yes.

Q. Then you were examined by Dr. Richards and some other doctors in Billings?

A. Yes, in Billings.

Q. After that you came to Helena and were examined by doctors in the hospital in Helena?

A. Dr. Lipscomb, I believe.

Q. Then you went to St. Paul and were in the hospital there?

A. I went back to Lewistown and after I had been in the hospital here at Helena I went back home in May or June, and I think perhaps in December when they sent me to Dr. Biddle in Lewistown, and my compensation was cut, but he said I was getting hospitalized, and I was sent to St. Paul.

Q. When did you first see Dr. Porter in Lewistown?

(Deposition of Carl F. Noble.)

A. I believe that was in December, 1922. It might have been in January of 1923.

Q. That is all.

Redirect Examination, By Mr. Mohumby:

Q. Since 1922 have you attempted to do any farm work yourself?

A. No. I have not had no team in the field since in the spring of 1922.

Q. What farm work, that has been done, has been done by hired help?

A. Absolutely.

Q. That is all.

CARL F. NOBLE

Plaintiff's Exhibit No. 1.

HONORABLE DISCHARGE FROM THE UNITED STATES ARMY

(Seal)

To All Whom It May Concern:

This is to certify, That* Carl F. Noble **2381589 Corporal Supply Co. 60th Infantry the United States Army, as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of** Circular 252 W. D. 1919

Said Carl F. Noble was born in Gustaviss, in the State of Ohio. When enlisted he was 29 5/12 years of age and by occupation a farmer. He had Blue

eyes, Brown hair, Ruddy complexion, and was 5 feet 6½ inches in height.

Given under my hand at Fort D. A. Russell, Wyo., this 30th day of July, one thousand nine hundred and nineteen.

H. C. Smith
H. C. Smith
Major A. G. D.
Adjutant
Commanding.

Form No. 525, A. G. O. *Insert name, Christian name first; e. g. "John Doe"

Oct. 9-18 **Insert Army serial number, grade company and regiment or arm or corps or department; e. g., "1,620,302"; "Corporal, Company A, 1st Infantry"; "Sergeant, Quartermaster Corps"; "Sergeant, First Class, Medical Department"

***If discharged prior to expiration of service, give number, date, and source of order or full description of authority therefor.

3-3164

(Seal) [114]

(Reverse side Plaintiff's Exhibit No. 1)

ENLISTMENT RECORD

Name: Carl F. Noble Grade: Corporal Y

Enlisted, Sept. 20, 1917, at Lewistown, Montana

Serving in First enlistment period at date of discharge

Prior service:* None.
Noncommissioned officer: Corporal March 18, 1918
Markmanship, gunner qualification or rating:* Not qualified
Horsemanship: Not mounted.
Battles, engagements, skirmishes, expeditions; Verdun Sector Oct. 6 Nov. 11-1918 Vosges Sector June 16-July 4-1918-July 14-Aug. 23 1918 St. Mihiel 9/12/18 to 9/16/18 Meuse Argonne Oct. 6-Nov. 11-1918. Cited for devotion duty during St. Mihiel offens. & Argonne 12-31-18
Knowledge of any vocation: Farmer
Wounds received in service: None
Physical condition when discharged: Good
Typhoid prophylaxis completed Oct. 25-1917
Paratyphoid prophylaxis completed: Oct. 25-1917
Married or single: Single
Character: Excellent
Remarks: Service; Honest and faithful. No A. W. O. L. or absence under G. O. 31 W. D. 1912 and G. O. 45 W. D. 1914
Entitled to travel pay to: Lewistown, Montana
Signature of Soldier: Carl F. Noble

C. R. Farmer
C. R. Farmer
1st Lieut. A. G. D.

(Stamps and endorsements not copied)

Commanding.....
Personnel Adjutant. [115]

Plaintiff's Exhibit No. 2.

Grass Range, Mont.
Jan. 22, 1931.
Director's Office
Jan. 27, 1931.
Received.

Director U. S. Veterans Bureau
Washington D. C.

Dear Sir:

I hereby ask that I be given $57.50 per month from date of discharge on my War Risk Insurance Policy; on the basis of a permanent total disability, from date of discharge. Said disability is due to my military service.

Respt yours.
Carl F. Noble.

C-1 242 376
[Seal] [116]

Plaintiff's Exhibit No. 3.

VETERANS ADMINISTRATION
[Seal] Washington

April 1, 1932.

Mr. Carl F. Noble,
Grass Range, Montana

In Reply To: FDB
NOBLE, Carl F.
C-1 242 376

Dear Sir:

This is with further reference to the above entitled claim. You are informed that a decision was rendered of Oct. 17, 1931, by the Insurance Claims

Council to the effect that the evidence is not sufficient to establish a fact that the former insured was totally and permanently disabled at a time when the contract of insurance was in force, and therefore the claim has been denied.

You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended.

If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record,

The case folder is being forwarded to the Veterans' Administration at Fort Harrison, Montana. Any further inquiries concerning your claims should be directed to that office.

By direction,

Insurance Form 909 H. L. McCoy

[Seal] Director of Insurance. [117]

Filed October 29, 1934.

Whereupon the hearing was continued until Tuesday morning October 30, 1934, at ten o'clock A. M.

Tuesday, October 30, 1934

Ten o'clock A. M.

Whereupon,

JOHN BOLLICK,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is John Bollick. I live at Grass Range. I have lived at Grass Range about fourteen years. I am acquainted with Carl Noble, the Plaintiff in this action. I first met him at Gettysburg, Pennsylvania. I was in the army. I was in the army at that time. As to what outfit I was with, I was with the 60th Infantry, 5th division, United States regular army. I was in the same outfit with Carl Noble. The same company and the same regiment. I was in the 5th division before they were at Camp Gettysburg. He joined the 5th division at Gettysburg, Pennsylvania. From that until the Armistice was signed I was with him constantly. After we left Camp Gettysburg, we went to Camp Green, North Carolina. While we were at Camp Green Carl Noble was taken down with the mumps at Camp Green, North Carolina, and swelled up, and I had to do his duty, he was at the infirmary several times marking "duty".

Q. What, if anything, occurred with reference to the mumps at that time?

A. He was swelling up——

Mr. BALDWIN: I would like to inquire whether you are telling what he told you, or telling what you saw?

A. I saw it.

(Testimony of John Bollick.)

Witness Continuing: I observed with reference to his mumps [118] after that that he was swollen at the neck, and he was swollen at the groin, below. We were in the same Camp together. As to what I observed with reference to his testicles, they were swollen up. As to what occurred with reference to any treatment of the mumps, he went over to the infirmary on a sick call, and they marked him "duty". He did do duty while in that condition. As to nature of the duties that he did perform, he performed the duty around there as assistant wagon master. As to what work is involved in that, it is bringing rations from the rail head to supply the regiment, and also equipment for the regiment of different kinds. As to whether his duties required him to do any drilling or marching, at different times he drilled. He did drilling or marching while in that condition. I do not recall any particular occasion of marching, but I know we were out at several drill times at that time, and fire drills, one thing or another at different times in that time. From Camp Green we went to Hoboken, New Jersey. His condition at that time was the same. We were at Hoboken about two weeks. We were not doing duty at Hoboken, we were laying there in quarantine; waiting for orders for overseas. At the end of the two weeks we procured orders to go overseas. Carl and myself went over on the same boat. I will describe his condition at that time: he complained of his mumps; his mumps had been still bothering him, and he had to do fatigue work on

(Testimony of John Bollick.)

the boat, like gathering stuff and cleaning up the boat. Of course, Carl did not do much work at that time, but still he was on duty.

Q. Describe his condition as it appeared at the time you first noticed this swelling below on him?

A. Well, his condition, his neck was swollen, and down below [119] here (indicating) he was swollen, and he wore a cloth around there to protect himself.

Q. What was observable with reference to his walking, if anything.

A. He walked straddle legged.

Q. Did that continue after that, and for how long did you notice?

A. Well, I noticed that Carl, when we were on the boat, that he was still that way until the time they hit Champano, France. That is at the point that we disembarked in France. We were at that place about twelve or fifteen days. We did not all of us go over on the same boat. Our outfit was again reassembled while we all together at Barchoo, France. I couldn't tell you how to spell that. That is the place that we disembarked. From that Camp we went up to Alsace-Lorraine. We went into shell fire in the Alsace-Lorraine region. As to how long we were under shell fire at Alsace-Lorraine, if I remember rightly, it was about fifteen days. From there we went to another sector, between St. Mihiel and Alsace-Lorraine. Carl was with me when we were up at Alsace-Lorraine, he was with me all through. He was with me at the second place that

(Testimony of John Bollick.)

I mentioned. I believe I recall what they called that sector, I believe it was St. Die. I could not tell you just how long we were there, I think somewhere around about fifteen or twenty days. We were under fire at that time. That was front line service. The general duties of the outfit that Carl and I were in, was to supply the regiment, and keep provisions for the men fighting on the front. He would get the provisions at the rail head. He would bring them up to the front by wagon trains. After we left the second sector that I referred to, we went to St. Mihiel. As to how long we were on that front at St. Mihiel, it was somewhere around about twenty or twenty-five days. Carl was with me at that time. As to whether [120] anything occurred on the St. Mihiel affecting Carl's health, Carl was gassed on the front at St. Mihiel along with the rest of us. There were about fifteen of us gassed. As to how that affected Carl, he vomitted when he got this gas. He reported with the outfit to Captain Morris, and there was never anything done, although Carl vomitted, and had diarrhea at that time. That was the same experience as the other fellows that were gassed. I was gassed at the same time. After we left St. Mihiel we went to Meuse Argonne. As to what portion of the Argonne we went, it was around Mount Pican. The nature of the country around Mount Pican is sort of a forest. With reference to whether it is level ground or otherwise it is rolling, hilly, mountainous; sort of mountainous country. As to what occurred to Carl while on the Argonne,

(Testimony of John Bollick.)

Carl was driving a team. I saw it and observed him myself. Carl was riding a mule, and there was a driver that could not drive his team. Carl said, you ride this mule and I will drive your team. He got on the wagon and there was a shell blowed up, and cut the brake rod, and the team went to the bottom of the mountain, and Carl was mixed up with the rations at the bottom of the mountain. I stopped and helped him out, and when I got to the bottom, the Captain said, Let us go. He said, We cannot stop, we have men to take care of those. We went on the front. There was about five days that I didn't see him. As to how this shell hit, it hit on the road and drove a big hole out in the road, and tore parts of the wagon off, that is, the side part, it went through the side part, and part of the end-gate; it blowed part of the end-gate off, and Carl went to the bottom of the mountain with this team; they would hold back, and they went to the bottom of the mountain. I said I didn't see him again for about five days. As [121] to his condition when I saw him after that. He was up. If you would ask him anything he would flutter, his hands would go, he would stutter, and at numerous times I would ask him for rations, when we were dishing out rations his hand would shake like that (indicating), and he would stutter, hands shake, and looked like a man that was about twenty years older. Prior to this occurrence Carl did not stutter that I know of.

Q. How long after this occurrence at Mt. Pican, were you in the Argonne?

(Testimony of John Bollick.)

A. In the Argonne, we went in September, and stayed there until November 11, when the Armistice was signed. We were getting ready to go over the top again when the Armistice was signed. As to how long had this occurred before the Armistice was signed, I presume it was along in October, about the 20th of October when this had happened. After the Armistice was signed we went to Esch Luxemberg. That is part of Germany, a little bit of a country by itself, a little country between Belgium and Germany. We were there until the 4th day of July, 1919. We were doing duty while up in Luxemberg, the duty was mostly drill; we discarded the wagon train, and we did mostly drilling. Carl was in the supply company during this time. I saw him every day. He was not doing any duty to speak of at all at that time. He was in one of the billets then in Esch. As to what I refer to as billets they had been the homes of German families, and they moved us into that billet, or those billets, they called them billets. As to what occurred to Carl with reference to his physical condition while in Luxemberg, he reported to the infirmary with me every day with the flu. As to how the flu affected him, he looked awful pale, and was awfully nervous at this time. I don't know that I noticed anything else with reference to his condition after he [122] had the flu.

Q. Do you recall anything with reference to his breathing?

Mr. BALDWIN: We object to that as leading. The man said he did not recall anything. We object to it as suggesting the answer.

(Testimony of John Bollick.)

The COURT: Sustain the objection.

Q. Do you recall noticing anything else with reference to his condition after he had the flu?

Mr. BALDWIN: We object to that as unnecessary repetition. He said he did not recall.

The COURT: Sustain the objection.

Q. Now, will you describe, or after you left Luxemberg in July, July 4, 1919, where did you go from there?

A. We come back to Brest, France. As to what we did at Brest we stayed there for examination for back home to the United States. We were shipped back to the United States then.

Q. Just describe to the jury Carl's condition at that time?

A. When we were shipped to the United States?

Q. At Brest, before you left for the United States?

A. Well, he was nervous, and he looked awfully pale, and shortness of breath, and if you would say anything to him, at times, he would fly just right off, his hands would flutter and it would take him fifteen or twenty minutes to tell you a word. As to what else I noticed with reference to his appearance at that time, he looked like a wild man. I will describe how he looked, his eyes looked glassy and bulged, and he just looked like a wild man. His hair was plumb white. It was not that way before he went overseas. I came back on the same boat with Carl to the United States, to New York. After we

(Testimony of John Bollick.)

arrived in the United States we went to Camp Dickson, New [123] Jersey, to be discharged, and he was sent to Fort D. Russell, Wyoming. As to when I again saw Carl after I left Camp Dixon, I saw him on the 26th day of June, 1920. That was after we both were out of the army.

Q. What was his condition when you last saw him before you were discharged, as compared to what it was when you last described him to the jury.

A. Well, when I saw him last at New York his condition had never changed, if anything he was worse when I saw him in 1920.

Mr. MOLUMBY: You got me wrong on that.

Mr. BALDWIN: He has answered the question. We object to your getting him——

Q. John, describe the condition he was in when you left New York as compared to his condition, the condition he was in at the time that you were on the boat that you described, or at the time you left Brest, which condition you have already described to the jury. How did that compare at that time?

A. Well, about the same. I stated I saw him again in 1920; that was at Grass Range, Montana. That was on June 26th, 1920. As to how I happened to see him at that time, I came out to see Carl, and stayed right there at Grass Range. As to whether I stayed at his home, I was up at Carl's home about five days. I will describe his condition to the jury

(Testimony of John Bollick.)

as I saw it at that time: At that time he was just as I left him in New York, he was nervous and he was pale, awfully pale in color, and he looked like he was aged up twenty years. As to whether he was doing the work there when I was there on the farm, he would try, get out and try to work; fly off the handle; he would try to tighten the bolts on his plow; he would get so nervous he would go and lay down. I have seen him from that time on frequently [124] some times three or four times a month, some times every day in the month. As to where I was living during that period from that time on, I was living with a man by the name of Shaw. He was the next neighbor to where Carl lived.

Q. In 1920, during that year in 1920, do you know what work he did or attempted to do on the ranch, if any?

A. Well, he didn't do any work at all. He hauled a load of grain or two to town here and there, and milked a cow. He had a man working on the farm then, his brother, and the next year his brother and him dissolved partnership, and he had a man named Ora Trapp working on his farm.

Q. Has he since he got out of the army, or after you saw him in 1920, has he ever done the work on the farm?

A. No sir. He has at all times that I know of, that I saw him in 1920, had help on the farm there. They were men that he hired. I don't know how

(Testimony of John Bollick.)

he and his brother had things arranged, whether they were on half shares, or how that was, but I know the next man he hired was Mr. Trapp. He hired him to work there by the month. As to how big a place he had there at the time that Mr. Trapp was there, I think it was around about 600 acres. There were about three hundred acres of that susceptible of cultivation. As to how much would be put into crop each year, he would put in about one hundred and fifty acres. Mr. Trapp did put in the crop alone.

Q. Did Carl's brother, Ferd, help him at any time?

Mr. BALDWIN: Object to this as leading.

Q. After 1920?

A. Yes, Ferd used to go there.

Mr. BALDWIN: I object to that as leading.

The COURT: Yes, it is leading all right. [125]

Q. Did any one other than Mr. Trapp ever work on that ranch after 1920?

A. Yes, he had several persons there after 1920. In 1920 he and his brother worked there together; his brother and he had the ranch together. Carl did not do any of the work himself, outside of milking the cow, and probably bringing in the wood; he did a little cooking at the house and brought in some wood, or maybe milked a cow, or fixed a plow, or something that the hired man or Ferd sometimes could not fix, or did not know how to fix it, he would go out and fix the plow, that is tighten up some

(Testimony of John Bollick.)

bolts, or something on the plow. In 1921, the next year, if I remember rightly, I think it was Mr. Trapp that was on the place. As to how they operated the place there after as compared to what he did the year that I described, he had a man there every year on the farm, running the farm. With reference to any medical treatment or hospitalization that Carl had, I know he went to the hospital several times he was at Fort Harrison I think in 1923, and different other times. I could not tell just how long he was in the hospital. I did not keep any record of it. I know he was in the hospital several times since.

Cross Examination by Mr. Baldwin:

I enlisted in Gettysburg, Pennsylvania. I had seen Carl Noble before that time. I saw him at Gettysburg, Pennsylvania, when we went in for inoculation. I had not seen him before my army service. As to how tied up with the same outfit, he from Montana, and me from back there, we were a regular army outfit and they shipped men from Washington and from the east to make this 60th infantry, which was the old 7th infantry, made it into the 60th Infantry. There was no 60th before the war. [126]

Q. As I understand it you were in the regular army before the war was declared with Germany, April 6, 1917?

A. I was in June 26, 1917,—September 26, 1917.

(Testimony of John Bollick.)

Q. Well now, you have spoken about a regular army outfit. What do you mean by that?

A. A regular army outfit is not a drafted army, or national guard, it is a regular army outfit that required one hundred regiments.

Q. How did you get in that, if you did not enlist, or get drafted?

A. I enlisted at Gettysburg, Pennsylvania.

Q. And you don't think that the four million men that went overseas were in the regular army?

A. Some of them were not; some of them were in the national army.

Q. Just draw that distinction, the regular army and national army. What is the difference?

A. The regular army requires one hundred regiments, and over one hundred regiments, as it was told to me, they are a drafted army, or army for the duration of the war. I enlisted so that I was in the regular army and not in the national army. I noticed this swelling in Noble's neck at Camp Green, North Carolina. I did go with him to the infirmary. I was sick at the time, I had the jaundice. They did not give me any treatment. They said I had the jaundice. As to what they said was wrong with Noble, they said he had the mumps. The major said that who was in charge. He was a medical officer. He did not give Noble any tests. I heard Noble's deposition read here yesterday. I never saw him give any medicine. I heard the deposition read. [127]

(Testimony of John Bollick.)

Q. You heard it repeatedly stated in his deposition that he received no treatment, and they sent him back?

A. They sent me back with him because I had the sick report.

Q. And did he get a sick report?

A. Yes, he was on sick report.

Q. Did you hear anybody in the medical corp of the army tell Noble that he had the mumps?

A. I heard that major in there say he had the mumps.

Q. I am asking you about the medical corp.

A. That is the major doctor. He told him he had the mumps. He said he had the mumps.

Q. Did he say he had them, or had had them?

A. He said he had the mumps.

Q. Where did he say that?

A. Right there in Camp Green, North Carolina.

Q. What place in Camp. Where was the major when he made that statement?

A. It was in the barracks somewhere, they had their medical examination. I could not tell just where they held their medical examinations, and the time and place. I could not tell you just the right space in the barracks. I know we were there twice that morning. He was sent back to duty. I had noticed the swelling in the neck for about two weeks before that time. He had the swelling in his neck for about two weeks before I heard the major tell him he had the mumps. I was quarantined in

(Testimony of John Bollick.)

the latter part of April, I think it was in April. I could not just call the date right.

Q. All right. When was that with reference to the time that the major told Carl Noble he had the mumps?

A. Along in April. [128]

Q. The question is, whether you were quarantined before or after you heard the major make that statement.

A. I was quarantined afterwards. I could not tell you how long afterwards. I could not give you an approximation, I just could not say about how long afterwards.

Q. Don't you know how long you were quarantined? Cannot you tell us whether it was days, hours, weeks, or months?

A. We were supposed to—

Q. I am not asking about suppositions, I am asking you whether you can tell us when you were quarantined?

A. No, I can not. I was quarantined for the mumps. Noble was not quarantined.

Q. You had the mumps then?

A. I had the mumps when I was a boy.

Q. You had them again in the army?

A. No sir.

Q. What were you quarantined for?

A. I was quarantined because the man had taken down with the mumps in the next tent to me. I could not say who was the man that was taken down in the next tent. They quarantined me because

(Testimony of John Bollick.)

someone else had the mumps. They did not quarantine Noble when he had the mumps.

Q. It is a custom in the army when a man has the mumps, they quarantine the man that was closest to him?

A. They did not quarantine him.

Q. Answer the question, it was usual in the practice in the army at that time in the division that you were in to quarantine a man that had the mumps.

A. I know I had not the mumps.

Q. Answer the question. [129]

A. Yes, it was. I didn't have the mumps. I was quarantined. I was quarantined because I had been close to some man that did have the mumps. They did not quarantine Carl Noble at any time in that Camp. At that time Carl's job was wagon master, meaning to haul rations from the rail head to the regiment, and equipment, such as guns and ammunition. When I speak of the rail head, I mean the supply depot, or quarter master department, which ever you may call it. He continued in that particular department throughout the war, or his service in it, as the wagon boy.

Q. Directing the work of others? What was his job as wagon boy, to direct the work of others?

A. He was wagon boy.

Q. In other words, he was sort of a foreman on the job?

A. A foreman, yes, and directing others as to how they should do their work. He did a good job

while he was in the army on that work. He knew what it as all about, and carried on his work well.

Q. Very competent in directing the work of others?

A. Well, I wouldn't say.

Q. You saw the work done, you saw how the supplies came in and how the wagon trains were handled, was it good or bad?

A. Well, I might say it was good. That is the line of work that Carl performed all through the army. He did enter into the trenches, when we would be up in the front, lots of times we would have to go to the front line trenches for a meal; we could not get back to the supply company.

Q. He was not up there with a gun in his hand doing any fighting?

A. Lots of times we had to take a gun just the same. [130]

Q. I am asking you what Carl Noble did?

A. He had to go up to the front with his rifle when he went up to the front. His job was to convey supplies from the rail head to the front.

Q. Or when the men in the front trenches were under fire, he would be probably at the rail head miles away?

A. Not always.

Q. I am asking you if on many occasions that wasn't true?

A. On some occasions.

Q. What time did he spend actually in the front line trenches?

(Testimony of John Bollick.)

A. I could not just say that. We were one hundred and five days in shell fire. I can answer to that. He was not in the front line trenches during those one hundred and five days at all times. I could not say how much of that time he was in the front line trenches. I stated that Carl walked straddle legged and that he had a swelling in his neck, and he had a swelling in his groin and that his testicles were swollen. He did show me his testicles. As to whether he showed them to the rest of the boys, he did to some of them; that was at Camp Green. I was in the infirmary with him when he had that condition. I presume he showed his condition to the medical men in charge there I was with him. I did not see everything that he saw; I heard what he said. I could not say that he told the medical men in the infirmary that his groins were swollen. I could not say that he ever told them that his testicles were swollen. I did see a medical officer in that infirmary make an examination of his groin or testicles; that was at the time I reported at the infirmary with him, sometime in April, and his testicles and groin were swollen then. I say the medical officer examined him. The medical officer asked him if he had been injured, if [131] I recall rightly they asked him if he was injured there, and he said no, he had the mumps but he was over them then, or something in that manner.

Q. What did the medical officer say?

(Testimony of John Bollick.)

A. He said he had the mumps but he was over them, in that manner, he was over the mumps, or something in that manner.

Q. What officer was it that made that statement?

A. The Major. I couldn't tell you what major it was. I couldn't just say his last name now.

Q. You said a minute ago?

A. I said the major. I did not say his name.

Q. I thought you did?

A. No.

Q. And he told Noble to get back to work?

A. He marked him duty.

Q. That is exactly what that means, get back on the job, is it not?

A. Yes.

Q. In other words, he was fit for work, or ordered to go back to it anyway.

A. Yes. Fatigue work means cleaning up around a camp. This fatigue work that Noble did was on the boat, it was picking up cigarette stumps around this boat; he was in charge of the men, swabbing up the deck, and picking up cigarette stumps, and some things like that.

Q. In other words, he was still continuing the bossing?

A. Yes.

Q. And he continued to boss them during the time he was in the service?

A. Well, he did, but I would say that he was not like he was [132] when I entered the service; he was awful nervous and flighty.

(Testimony of John Bollick.)

Q. That is not responsive to the question. The question was did he continue to boss the men during all the time he was in the service?

A. Yes sir. In other words he had one of the top jobs. As to how many men he was directing, it was a battalion, I would say about thirty-five or forty men. I say he was the boss wagon man. He had thirty-five men engaged in that employment under him all the time during the war. He was never taken out of the top job, or the boss's job. Nothing happened to Noble that I know of while we were under shell fire in Alsace-Lorraine. There was something happened while we were under shell fire in the Argonne field there was a shell blew up on the road that tore part of the end-gate, cut off a brake rod, and Carl's team went to the bottom of the mountain and mixed up with a lot of rations. I was in the wagon train when that happened. I was under his direction during the time I was in the army, and all of the time. At the time of that occurrence I could not have been over one hundred yards or two hundred yards away; I was following him, about one hundred yards or two hundred yards away. After this occurrence I did not see him for about five days. I know what his condition was after that happened, after the five days, but not after the occurrence. As to where I was when I next saw him after the five days had passed, we were in a camp, moving into the front general line, we were spread out in the woods somewhere in

(Testimony of John Bollick.)

the brush; some were in the brush, anywhere at all, or under trees, so that the airplanes could not locate them. I was employed in carrying supplies to the front; in other words supplying needs of the soldiers in the trenches. Noble came back and took his same old place, he was wagon master. He did not lose any of his authority [133] over the thirty-five men that he was directing because of his condition. I did not notice any difference in the work in that division that was under him before and after that five day period.

Q. In other words he carried on his work the same as he did before?

A. I think it was done through excitement more than anything else.

Q. Well, he must have been pretty excited to continue to do that until he got back to Hoboken?

A. We didn't arrive in Hoboken.

Q. Where did you land?

A. We landed in Long Island. He directed the work of that wagon train with thirty five men until we got back to the United States. The work went along right under his direction. So far as my observations went, it went along just as well as it had before this shell explosion. Men at the front lines, at the front line trenches got their ammunition and food, and everything was going along all right so far as the wagon train was concerned; no hitches because of any ill health; no stopping of supplies

(Testimony of John Bollick.)

because of anything due to Nobles condition during that time. He appeared to be a very competent man, doing a good job. Noble got the gas in the St. Mihiel sector. I could not tell you the date, and he also in the Meuse, Argonne. I was gassed at the same time.

Q. Did you stop work?

A. No, it would not have done me any good if I did have.

Q. Why not?

A. Well, they would mark you duty if you ever went to a sick call. [134]

Q. Depending on how badly you were gassed?

A. Well, I don't know about that.

Q. What is that?

A. I say I couldn't tell about that. I was issued a rifle when I entered the army, and Noble was issued one. I never did go over the top, nor did he. I was with him all the time. It was not a part of my job, nor his job to go over the top.

Q. Why did you state on direct that just before the armistice on November 11, 1918, you were ordered to go over the top?

A. What I meant to go over the top, we were supplying the outfit; we went to the front line trenches; we were right up to the boys, we got in a mix up, I think they were counter-flanked. The Captain ordered us to quit the team and take the rifle and go to the front. In other words, if we went up there to fight, the boys would have had to go without their ration.

(Testimony of John Bollick.)

Q. And you and the men working under Noble were the only means of supply for ammunition?

A. No.

Q. What else did they have besides that wagon train?

A. I don't get that.

Q. I am asking you what other means they had of supply besides the wagon train that Noble was operating at that point?

A. Nothing outside of the ammunition train.

Q. And if you and the other drivers went into the front trenches there would not be any means of supplying that particular division, would there?

A. You mean just me and Noble won the war?

Q. I don't think you won it. I think it took about five million Americans, and lots of Frenchmen.

A. That is what I thought. [135]

Q. It took a lot of people working hard?

A. There was lots of them up in the front besides me.

Q. The question is whether Noble and you, and the rest of the wagonners were in the front trenches fighting, would there be any means of supplying the men in the trenches?

A. They would not if they had captured the wagon trains. We could not go over the top with the wagon trains. If we were all in that trench the wagon train would be tied up. The boys in that trench would be without means of food.

(Testimony of John Bollick.)

Q. For how long did they keep the boys without food so that you could carry a gun?

A. I think we were about four hours in the counter attack, then we went back to the wagon trains. I continued on that job until I left the army. That was not the only time that I was in the front line trenches; I had been there several times.

Q. And were you on duty in the front line trenches several times, that is, getting ready to go over the top?

A. Not getting ready to go over the top, but supplying the boys right at the front. I was gassed the same time that Noble was gassed. I never received any treatment for the gas. I have had a physical ailment since, I have had arthritis and pleurisy I got arthritis at Camp Green, North Caroline, and have had it ever since.

Q. Still you did the work for one year on Noble's farm in Montana?

A. No, I never worked a year for Noble in Montana. I worked for him about two months, about sixty days, I could not say what year it was. I then went to work for a man named Shaw. I worked for Mr. Shaw before I ever worked for Noble. I did plowing for Mr. Shaw.

Q. You were able at that time to do heavy work on the farm, were [136] you not?

A. No, I didn't say I was able to do heavy work.

Q. Well, you did it, didn't you?

(Testimony of John Bollick.)

A. I plowed, drove a team. At to what line of work I have been engaged in since that time, I have been engaged in practically the same kind of work. It would be designated as general farm work.

Q. What kind of farm work did you do?

A. Well, there is a lot of farm work that I didn't do. I was employed by Noble on several occasion, small periods of time. I hauled grain for him and cooked for him, and I plowed one fall. I could not tell you the date of that fall right now.

Q. Now, these dates are important. We want to know when you were there so that we can tell what his condition was in various years. Cannot you give us the year?

A. I could not at this time. I could not say. I know I was hired by Noble on a number of occasions. At the present time I cannot give you the year of any period of my work for him. I could not say that it might have been as late as 1924 or 1925. I couldn't say when I did last work for Noble. I cannot tell what years I was working for him. I cannot tell what year I last worked for him. I cannot tell you any year that I did work for him at any time. As to who I was working for in the fall of 1919, I worked about two weeks for the E. J. Lavia Iron and Steel Company at Marietta, Pennsylvania. I was not in Montana at all in the year 1919. I first came to Montana on the 26th day of June, 1920. I had not seen Noble from the time I left the army until that day, about eight or nine months time I think it was.

(Testimony of John Bollick.)

Q. And as I understood your direct testimony you immediately went to work for him upon meeting him? [137]

A. No I did not. His brother was on the farm at that time.

Q. And there were a couple of hundred acres under cultivation.

A. They had about three hundred acres under cultivation, but about one hundred and fifty acres is what they farmed.

Q. Is one man supposed to take care of that much land on a farm?

A. Well, his brother used to take care of one hundred and fifty.

Q. I am asking you if under ordinary circumstances one man is supposed to do the work necessary on a farm of that size in Montana?

A. No, not all of it.

Q. As a matter of fact that is a two man job.

A. Sometimes six.

Q. And still you think that Carl Noble was not able to work because he could not do the work on that ranch, without hiring a man or two?

A. That was not what I based it on. I could not say how many men he hired in 1920. I couldn't tell you how many men he hired in 1921.

Q. Was it one, or two, or three?

A. Well, at different times he probably had.

(Testimony of John Bollick.)

Q. I didn't ask you about probabilities. I am asking you what you know.

A. Probably at threshing time there would be fifteen there.

Q. I am talking about ordinary times, when ordinary farm operations were going on.

A. Well, he had a man there.

Q. He had a man, but it was a two man job?

Mr. MOLUMBY: He never testified to any such thing. He said it was a six man job at different times. [138]

Q. Does the ordinary farmer take care of the operation and cultivation of three hundred acres of land, and the seeding and harvesting of one hundred and fifty acres?

A. They would at times. There are some men put out one hundred and fifty acres in wheat. That is an exceptional man.

Q. The average man cannot do it?

A. Well, I wouldn't say that. I know lots of farmers that put out two hundred acres and they do their farm work, that is their plowing and summer fallowing with a tractor; they put out two hundred acres. Noble never did have a tractor. All the work that was done on that farm was done with horses in the way of plowing, and things of that kind, eight head of horses and a three way plow.

Q. With that equipment one man could do the work alone?

A. With that equipment?

(Testimony of John Bollick.)

Q. Yes.

A. Well, not exactly, no.

Q. Now, we will suppose that they not only had a eight horse plow but they also used at the same time a four horse plow. You will agree with me that one man could not drive both plows.

A. No sir, he couldn't drive two plows.

Q. As a matter of fact in the work on the Noble farm that is the Carl Noble, that is the way it was done with an eight horse plow and a four horse plow?

A. I could not say whether he had a four horse plow there. I never seen one there. I saw a three way disc plow, eight horse plow. I said after Noble got back to this country he looked pale. There is not anything of the ordinary in looking pale. I would not say how pale he looked, it was pale he looked an awful lot like an orange peel. [139]

Q. In other words, he looked anything but pale then?

A. No, he was pale.

Q. You say he had an orange color?

A Well, sort of orange color, and his nervous condition, any time you would ask him anything, he would just flutter around, his hands would shake, and he would stutter.

Q. When you were all under his direction in the army, did he stutter and flutter?

A. Yes, after that shell fire, he did, he tried to win the war alone. He done a lot of work. He made

(Testimony of John Bollick.)

the men move up, that was wounded, he said these men had to have those rations on the front. He tried to win the war alone.

Q. But the fact is that he continued after that shell explosion, just the same as he had before, and went right on, right on winning the war single handed?

A. Outside of the time he was in Esch when he was sick and down with the flu, he had shortness of breath.

Q. Outside of that period, he went right on winning the war single handed?

A. I would not say after he was in Esch, there was not much to do; there was hardly anything to do; there were no wagon trains to take out any way.

Q. You didn't see him at any time between the time he was discharged from the army, on or from July 10th, 1919, until you saw him in 1920?

A. I didn't see him, I think it was the latter part of July, 1919, until June 26, 1920.

Q. When you saw Noble in 1920, he was operating the ranch out at Grass Range, was he not?

A. Was he operating the ranch?

Q. Yes?

A. No, he was doing work around the ranch; his brother was running the ranch.

Q. What do you mean by running the ranch?

A. He would take a [140] load of wheat to town, and probably bring back the groceries, and bring back implements, and something like that, machinery, and milk a cow.

(Testimony of John Bollick.)

Q. Who did those things, is that his brother, or Carl?

A. Carl done that and his brother Ferd done the farm work.

Q. Who directed the operations, that is, the planting, what should be planted, and the harvesting, how it should be done, and the selling of the product?

A. I couldn't say. At that time the ranch had about 600 acres in it.

Q. Aren't you mistaken, wasn't the ranch at that time, 300 acres?

A. Well, he had some land leased of his brother's, I think it took in around 600 acres.

Q. But since that time the amount of land cultivated on the Carl Noble ranch, has been increased quite a bit, has it not?

A. I couldn't say that.

Q. You have been in the neighborhood, tell us whether it was or not?

A. Increased?

Q. Yes.

A. I couldn't say that. I would say it was decreased.

Q. Noble has been directing the work on a 160 acre farm ever since that time?

A. I wouldn't say that.

Q. Who has directed the farming on that land of Carl Noble's when his brother went on his own land?

(Testimony of John Bollick.)

A. The man he has working on his farm, Trapp is one of them; Bill Haight was another; he worked there two years. Trapp worked there in 1921 and part of 1922; Haight came there right after Trapp left. I could not tell you when it was that I worked there, because I never worked for him by the year, I only worked with him there just a few weeks at a time, maybe a week or ten days, or through threshing, or hauling grain, or something like that. I could not tell just how long it was. [141]

Q. You think the man that Noble employed told him how to run the ranch?

A. He must have when Carl was in the hospital in Minneapolis. I couldn't say when that was. I did not ever see him in the hospital at Minneapolis. As to whether I saw him in any other hospital, I saw him in the Fort Harrison hospital in 1923. I couldn't say just what time in 1923 that was. That is not the time that Noble was operated on for appendicitis. I could not say how long I was with him in the hospital in 1923 at Fort Harrison. I could not say how long he was away from the ranch at that time, because I stayed at Fort Harrison until spring. If I recall rightly Carl was transferred to Minneapolis and went home, and was transferred to the Minneapolis hospital.

Q. You didn't see him at Minneapolis, that is all hearsay as to what happened there?

A. I didn't see him at Minneapolis. I saw him at Fort Harrison. I saw him on the farm this year,

(Testimony of John Bollick.)

and I saw him last year. I have seen him every year since 1920. I have not been living on the adjoining land, right next to him, all those years. I have been living about four miles from him. As to how frequently I visited the Noble ranch, sometimes I would be up there two or three times a week; sometimes I would go up there every day for a while, probably stay there with Carl a couple of weeks at different times.

Q. The land is good land, is it not?

A. Well, I wouldn't say that. It produced several good crops, I cannot say it is good land.

Q. In other words, in spite of poor land, it produces good crops?

A. With the exception of the moisture they had, they had one or two good crops.

Q. It is a boast of Carl Noble, who has been operating there since 1920, that he has the best farm around in that country? [142]

A. I wouldn't say that.

Q. You heard him say that he was the best farmer out there many times?

A. I heard him say that their farm produced the most wheat, but I wouldn't say that he raised it.

Q. But he, as a matter of fact, he was raising more wheat per acre than anybody in that district during the years you have been there?

A. No, I wouldn't say that.

Q. How did his crops compare with the land that you were working on?

A. About the same.

(Testimony of John Bollick.)

Q. Were the crops good or bad?

A. I couldn't say. I think it was in 1923 we had a good crop, real good crop in there, and that was an exceptional year. Outside of that it was very light.

Q. Now, how much was the average yield of wheat on this land in that vicinity?

A. Well, I would say that real good years——

Q. I am not talking about real good years. You heard the word "average" in that question.

A. Average?

Q. Yes.

A. That would be a hard thing to say. Six or seven bushels, you mean through from that time on until now?

Q. Yes.

A. About six or seven bushels, and that is putting it high.

Q. It may be below that on the average?

A. Of course there is one year there that they had a big crop, and there is lots of years that they had nothing.

Q. What was the year of the big crop?

A. I presume it was 1923 or 1924.

Q. You heard Noble's deposition read yesterday, and you heard him say in that deposition, did you not, that if he did not get twenty bushels to the acre, he thought he was having poor luck?

A. I didn't hear that, no, sir.

Q. So that if he was averaging twenty bushels to the acre, he [143] was doing more than other farmers in that district.

(Testimony of John Bollick.)

Mr. MOLUMBY: He didn't say anything about getting twenty bushels to the acre.

Mr. BALDWIN: He said it was a poor year if he didn't average better than twenty bushels to the acre.

A. I wouldn't say that.

Q. How much did he average per acre, if you know, all through the years?

A. About six or seven bushels all through the years.

Q. Now, in Mr. Noble's deposition we find this: Q. "How was your average crop from 1923 until 1928 or 1929, when you said you had very poor results?" A. "We had average crops, I didn't say, twenty bushels or such a matter, if it fell below twenty bushels I felt I wasn't getting much." Q. "To the acre?" A. "Yes". Q. "How did it average up with the farmers adjoining you?" A. "Away ahead of them." Q. "Was that because of their failure to use your modern farming methods? or were they less skillful than you in farming?" A. "They didn't use the right system." Q. "You used the same system and lived on the farm all these years, directing the operations?" A. "Yes." Now, in the light of that testimony can you tell me what the average yield per acre of wheat was on the ranch on the Noble ranch or farm, from 1923 or 1929?

A. No sir, I couldn't say.

Q. But you say during those years the average——

A. They had a couple of years, they had good years for about two years then they raised good crops.

(Testimony of John Bollick.)

Q. I am speaking of an average year.

A. Well, I would say six or seven bushels.

Q. That was the average yield in that vicinity on the farms of the same kind? [144]

A. Yes.

Q. And that applies during 1930, 1931, 1932, 1933, 1934, did it not?

A. Yes.

Q. Now, did you ever tell anybody about this explosion, when you were under examination, in connection with the injuries that Noble had suffered?

A. I probably have not, outside of some buddies, when we were talking it over.

Q. You made an affidavit in an effort to help Mr. Noble?

A. Yes.

Q. When were those affidavits made?

A. I think 1923. I made two affidavits, I believe. I probably in one of those affidavits referred to the explosion of a shell.

Q. And did you mention this explosion when he was driving this wagon in either of those affidavits?

A. I probably didn't mention it.

Q. You didn't think it of any importance at that time in 1923—when you made those affidavits?

A. I will say at those times when they asked me for an affidavit a lot of times, you generally overlook something like that.

Q. Well, you were not overlooking the fact that you had been requested by your friend Carl Noble to make affidavits, were you?

(Testimony of John Bollick.)

A. What is that?

Q. You did not overlook the fact at the time you made these affidavits that Carl Noble had asked you to make them, and told the truth?

A. I told the truth.

Q. You did not tell the whole truth?

A. I told the whole truth. [145]

Q. And I suppose you told nothing but the truth?

A. No.

Q. Why didn't you mention this explosion when he was driving this wagon in either of those affidavits?

A. Well, I just cannot say why I didn't. There is a lot of stuff that I should have mentioned in that there, but I didn't.

Q. That is your only explanation. Did you tell them that Carl Noble had come back white haired five days later, in either of affidavits?

A. I don't think I have.

Q. Did you tell them that his hands were fluttering, and he stuttered, in either of those affidavits?

A. No, I did not.

Q. Did you mention anywhere in those affidavits the things that you mentioned here?

A. I believe I have some of them.

Q. What part?

A. Shortness of breath and he was pale.

Q. And that is all you said in those affidavits that you can recall.

A. And I mentioned the mumps.

(Testimony of John Bollick.)

Q. Did you mention the flu in Luxemberg, did you mention it in the affidavits?

A. I presume I have. I recall when those affidavits were made. They were made in 1923.

Q. And in those affidavits, as I understand it, you did not mention about this wagon train incident at all?

A. I don't think I have.

Q. You didn't mention about his being highly nervous and excited?

A. I probably did not. [146]

Q. And you did not mention about his hands fluttering and his stuttering?

A. Not in the affidavits, I don't think I did.

Q. Those affidavits were made eleven years ago?

A. Yes sir.

Q. Was your recollection better then than it is now?

A. Well, no.

Q. In other words, you recall as vividly in 1934 the experiences that you have related as you did in February of 1923?

A. I didn't get that.

Q. In other words, you recall as vividly in 1934 the experiences that you have related, as you did in February of 1923?

A. Yes.

Q. And you recalled that less clearly in 1923 in February, that occurrence as you recall it now?

A. I wouldn't say that.

(Testimony of John Bollick.)

Q. What has caused your memory to get better as the years run on?

A. It is not any different only at that time I noticed this here but I noticed this other incident at that time when he had that shell blown up. I should have put that in that affidavit, but I did not.

Q. Well, now is the Noble ranch in as good condition now with reference to production, general upkeep and appearance, as it was when you first saw it in 1920?

A. Is it as good?

Q. Yes.

A. No.

Whereupon a recess was had.

After Recess

Q. Now, has Mr. Noble added to his farm holdings down at Grass Range [147] since he came back from the army, to your knowledge?

A. I couldn't say.

Q. But the farm has been operated each year, has it not?

A. Yes, by hired help.

Mr. BALDWIN: I will ask that that be stricken as not responsive.

Q. The question is whether it has been operated, the farm has been operated?

A. Yes.

Q. And he has a nice house on the place?

A. No, I wouldn't say.

(Testimony of John Bollick.)

Q. How about out buildings?

A. He has a good barn.

Q. This land is well cared for?

A. Not in the last ten years I wouldn't say it was.

Q. That is not since 1924?

A. I should say 1920, since 1920 it has not been well cared for.

Q. How was it in 1918?

A. I don't know what it was in 1918.

Q. But you just know that Noble gets the best crops they grow there, but he don't care for the farm?

A. I know they raised a good crop in 1923, weather conditions—

Q. And since then the average crop down there has been six or seven bushels to the acre?

A. Yes sir. I made two affidavits for Mr. Noble. I cannot recall the dates on which I made those. I think it was in the year 1923 I also made one in 1925. I don't think I mentioned the second gassing, and I did not mention this shell occurrence in either one of those affidavits. The first affidavit was made in 1923, but I couldn't tell you what date.

Q. Well, read it, and now tell us what date. [148]

A. On February, the 19th, 1923. I made that affidavit on that day having had my attention called to the one I made in 1925, this was made on June 4 of 1925. I have not made any other affidavits in connection with Carl Noble. Carl Noble was not

(Testimony of John Bollick.)

present when I made those affidavits. I think Mr. Brooman prepared the affidavits at Grass Range. I told him what to put in and he made the affidavits. Then I finally signed them. He put in the things that I told him to put in the affidavits.

Q. I will ask you if it was not a fact that Noble made affidavits for you at the same time that you made these affidavits?

A. I wouldn't say that. I don't know whether he did or not.

Q. The question is whether he was there making affidavits for you at the time you were making affidavits for him?

A. No sir. I know he made an affidavit for me. Not about the same time that these affidavits were made by me for him. He made the affidavit for me when I was in the hospital at Fort Harrison, and sent it to me in 1923.

Redirect Examination by Mr. Molumby:

Q. John, generally since you have been back from the army, what has been your physical condition?

A. My physical condition is poor. I put in about four years in the hospital since the war, and at numerous times I have been in bed at home. I have received medical attention portions of the time since I have been back. As to how recently I have received medical attentions, it was about six weeks ago I had an operation for sinus trouble, and lost my left eye.

(Testimony of John Bollick.)

Recross Examination by Mr. Baldwin:

Noble was not married when I first met him at Grass Range in 1920. He has married since that time. I could not tell you just exactly what year, but I believe in 1924. That is as close as I [149] can get to it, I could not say. I was in the hospital, I think, at the time he was married. I am not certain of the date. If as a matter of fact he was married on April 7, 1928, that does not refresh my memory, I could not say. I know he has married since the war. I think it was probably not earlier than 1924.

Witness excused.

Whereupon,

HARRY HILLSTRAND,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is Harry W. Hillstrand. I reside in Great Falls, Montana. I am manager and half owner of the Electric City Printing Company, Great Falls. I was in the army during the world war. I was in the sixtieth infantry, fifth division. I am very well acquainted with Carl Noble. I first met him at Spokane, Washington, Fort Wright. As to the occasion of my meeting him at that time, we were in the barracks at Fort Wright, naturally I was feeling kind of homesick and lonesome, he was

(Testimony of Harry Hillstrand.)

from near Great Falls, from Lewistown, I believe he said he had enlisted at Lewistown both recruits, just been sworn in the army at Fort Wright. Noble and myself were not in the same company; we were in the same division; in the same battalion. I will explain to the jury what a battalion is. A battalion in the infantry is composed of four companies; four companies of infantry; each company of infantry consists of two hundred and fifty men. In addition to these four companies there is attached a wagon train from the supply company which consists of approximately three wagons and drivers for each company, which makes about in the neighborhood of a dozen drivers to each wagon to handle supplies and ammunition. In one of them wagon trains, there is always a supply company, non-commissioned officer; he may be a Corporal or Sergeant, or he might be a first [150] class private. In addition to this, in command of a battalion, there was a Major who had an adjutant, and lieutenant and second lieutenant, and probably a small headquarter staff of ten or fifteen men. I was in Company G, 2nd battalion, 60th infantry. I was not a portion of the wagon train. As to what portion of the battalion Noble was connected with, he was the wagon master, that is the non-commissioned officer in charge of the wagon train in our battalion. As such I got to know him when I was attached to the battalion headquarters, and later I was first sergeant in company G battalion. I got to know him well, having

(Testimony of Harry Hillstrand.)

been with him all the way through. After I was at Spokane, I was sent to Gettysburg, Pennsylvania. We were in Pennsylvania approximately a month, then we went to Camp Green, North Carolina. As to whether I was with Carl all the time, it all depends on what you call with him; he was in the supply company in the same regiment, and being from Montana we struck up a friendship, we always visited back and forth; we were in the same regiment, and not in the same company. He was in E company. Before we went to Camp Green he was transferred to the supply company. After we were at Camp Green we went to Camp Merritt, Long Island. From there we went to Liverpool, England. Carl and myself did not go over in the same boat. As to what, if anything I knew about his physical condition when I first met him over at Spokane, he looked like the rest of us. He was all right; he got in; passed a strict physical examination. I remember him passing the physical examination. As to his appearance at that time, he was older looking than I was; he looked about his age. I know he was bald headed, his hair was not all gone, what he had was kind of a dark brown; he looked to be in good physical condition. He must have been to have gotten in.

Q. What do you know about his physical condition at Camp Green? [151]

A. Well, that is hard to answer. I saw him off and on. I remember he was sick down there. He had been sick at Gettysburg, that is what he told me.

(Testimony of Harry Hillstrand.)

Mr. BALDWIN: We will ask that be stricken as not responsive and hearsay.

The COURT: Yes, sustain the objection.

WITNESS continuing: Subsequent to this occurrence at Camp Green, I next saw him at Vassiro, France. I will describe what his condition was then. He looked bad. He looked sickly. I asked him what was the matter. He said he had the mumps.

Mr. BALDWIN: We object to that self serving.

The COURT: Yes, sustained.

Q. Just describe what you observed as to his condition, and what he said?

A. He looked like he had been sick; he looked pale. After we were at that camp, our division or battalion went up to the Voges sector the proper name for it was Aisne sector, was the name that was given to it on the map, as I remember it. We were on that front approximately two weeks. From there we went back to the training area for a short time around Espinauld and St. Mihiel, from there we went back up to the front. That was in the Sandy A sector. That was an area just south of St. Mihiel sector, south of Chateau Thierry. We were under fire in that sector for a period of thirty-nine days. We were in the previous sector the first time we went up approximately two weeks, it may have been ten days or twelve days something like that.

Q. Do you recall anything occurring to Noble in the St. Mihiel sector?

(Testimony of Harry Hillstrand.)

A. You mean the Sandy A sector?

Q. You were there for this period of thirty-nine days?

A. Yes. [152]

Q. Did you later go up to the St. Mihiel sector?

A. Yes.

Q. And for how long a period of time were you up to the St. Mihiel?

A. About ten days.

Q. And do you recall anything occurring to Noble up there?

A. Not any specific incident. I saw him practically every day or other day, or so. I don't recall any specific incident happening to him. From St. Mihiel we went in the training area just behind the sector, behind the front, two miles in front, then we went to the Meuse Argonne. We were in the Argonne for the same length of time we were in the Sandy A, for thirty-nine days under fire. I don't recall anything occurring to Noble up there at that time, not any specific case. I will describe to the jury what his condition was as I saw him while up in the Argonne. His job, of course, was to get the wagons with the supplies to any infantry company. As I remember Noble he was always riding a mule, and he was a man of a highly nervous disposition, that is, he was in the Argonne. He was gradually getting worse. He got the wagons up there. We used to have a saying—

Mr. BALDWIN: We object to what the saying was as hearsay.

(Testimony of Harry Hillstrand.)

The COURT: Yes, sustained.

WITNESS continuing: I will describe how he appeared up there and how he acted. He acted like if it was too much of a nervous strain for him. He was shell shocked in our opinion.

Mr. BALDWIN: I ask that it be stricken, as stating his opinion.

The COURT: Yes, sustain the objection.

Mr. BALDWIN: I will ask that the jury be admonished to disregard it.

The COURT: Yes, you may disregard it.

Q. Harry, did you see many shell shocked men up on the front? [153]

Mr. BALDWIN: We object to that as immaterial.

The COURT: You better qualify him as an expert as to what are the symptoms of shell shock so that he might be able to testify.

Q. Did you see numerous men up at the front which were shell shocked?

Mr. BALDWIN: We object to that as not qualifying him, to show what is shell shocked.

The COURT: We are liable to wade in pretty deep, but you better qualify him.

A. I could talk for an hour on shell shock.

Mr. BALDWIN: So could I, but I don't know anything about it.

Q. Just describe what his condition was, as you saw him?

(Testimony of Harry Hillstrand.)

A. When I saw him he was sitting on that mule. He was always yelling at the men, and spitting all over himself. He would get so excited he was wild. He would curse anybody that would interfere with his work, I presume. I have seen him curse officers, which he could get court martialed for. He was a likable fellow. He would have cursed General Pershing. His main purpose was to get those wagons up there whether it killed him.

Mr. BALDWIN: I move that that be stricken.

The COURT: Yes.

Q. What other physical manifestations did you see, Harry, of his condition at that time?

A. He looked thinner and older. His eyes were staring.

Q. When he was up at the Argonne, what was the color of his hair?

A. It was so dirty we couldn't tell what color a man's hair was. He was practically gray haired then. As to whether it was that way when I first saw him in November, I will say it was a dark brown. He was kind of bald in front. We stayed there on the Argonne until the Armistice, November 11, then we went immediately right up to [154] Germany; followed right behind the Germans. We went as far as Trier. As to what portion of Germany that was in, or what province in Germany, I will say that I don't know enough about Germany to know. It was this side of Coblentz. We went back to Luxemburg. We were stationed at this place that

(Testimony of Harry Hillstrand.)

I mentioned up near Coblentz. We were at that place approximately eight months. The name of this place was Esch. That is a province of Luxemburg. We were not stationed at Trier, just there for a time and come back. We were in several little places in Germany; I just cannot recall their names. While stationed at Esch and Luxemburg, I recall something occurring to Mr. Noble with reference to his physical condition; he had the flu. I don't know for how long a period he had the flu; I imagine a couple of weeks. At that time he was with the supply company. I imagine he was in bed there at Esch.

Mr. BALDWIN: We move that the latter part of the answer be stricken; his imaginations have no place in the record.

The COURT: Yes.

WITNESS continuing: I did not see him in bed. It may have been the 5th or 6th of July that we left Luxemburg. It was right after the 4th of July, I know that. During those periods that we were up on the front, we were always in the front line trenches. As to where Carl was during that period, he was on the supply wagons, which we considered the front line trenches. They were a mile or so back of us, which was just as dangerous as the front part, in fact, more dangerous.

Mr. BALDWIN: I move that be stricken.

The COURT: It may stand. It will not do any harm.

(Testimony of Harry Hillstrand.)

WITNESS continuing: The area in which he was, was always under shell fire, continuously. As to the kind of shell fire, generally these three inch shells, and six inch shells. They were generally [155] more under the shell fire than we were, because back of the lines they always get the heaviest shell fire. They were not susceptible to rifle fire, but were more susceptible to shell fire.

Whereupon the hearing was adjourned until two o'clock P. M.

Tuesday afternoon, October 30, 1934.

Direct Examination Harry W. Hillstrand continued by Mr. Mohumby:

WITNESS continuing: As to the nature of the shells that were being fired on the front that I was on and that Noble was on they consisted practically of every kind of a shell that they had invented during the war, mostly shrapnel and gas. As to how the gas was fired, the gas shells dropped intermittently with a shrapnel shell. You might have a shrapnel shell drop on you one minute, and the next minute a gas shell. They were both fired at the time, as a general rule they were both fired at the same time; the gas shells hit mostly at the supply department and ammunition train. As a rule on the front line where the infantry were, we generally had shrapnel. As to the distinction between the front line and the first line, the front line, the way it was termed in the army, would include an area from the first line directly in front of the enemy

(Testimony of Harry Hillstrand.)

to a base maybe four or five miles back in fact, the front line was directly under fire, and that was under fire, it would not be necessary to be fifty feet from the Germans, or might be ten thousand feet. The danger really was the same. What we termed the first line, there would be a first line and second line and third line; it might be two or three hundred yards apart, and the reserve would be behind that; anything within danger of three inch shells, that is, three or four miles from the front, we always termed the front line. That area would be traversed by the wagons in bringing up supplies. In fact they [156] were always right in that area all the time. They were very seldom out of that area. It is hard to answer where they would have their ammunition dumps and supply dumps. They would have the large trucks to pick them up, within four or five miles to the first line, and these wagons, regiment supply wagons, they would get them and bring them up a little closer, and they would gradually work them up to right where we were right in the first line. These dumps were generally within two or three miles; not any more than that, the regimental dumps.

Q. What do you know about the gas that was in that area at St. Mihiel and the Argonne over which these wagons including Carl Noble's were going?

A. Those areas were always soaked with gas; they were intermittently firing all the time. They

(Testimony of Harry Hillstrand.)

might let up on the gas firing for one day. You may have passed through the valley that had been gassed the day before; you could be gassed two days after the shells had exploded. As to how long the gas would stay on the ground after the shells bursted, that all depended on the weather and where it landed. If it was in the valley, and no wind blowing, it might stay there a couple of days. If it was up on the hill and the wind blowing it wouldn't stay there two minutes. It depends on the climatic conditions. If it was raining it would hang close to the ground, if it was hot, why, it would rise.

Q. Now, Harry, after you left Luxemburg were you and Carl together?

A. Well, we were not together until we got to New York, then we were together from there until we got home. I don't know just where I left him after we left Luxemburg. The entire division left Luxemburg at the same time, within two or three days; some went some place and some went the other. I think the entire [157] division went to Brest. I am positive that Carl and myself came home in the same boat. We were again together in New York. I came out from New York to Fort D. A. Russell with him; that is sat in the same seat with him a good deal of the way. I will describe to the jury what his condition was on that trip from New York to Fort D. A. Russell, but it is kind of hard to describe. It was generally the same as he was in the war in the Argonne. He was nervous

(Testimony of Harry Hillstrand.)

and awfully temperamental, and he stuttered a lot. He was nerve racked; he did not have any nerves. He looked a lot older. In fact we considered him the old man when we came home. He was much more baldheaded. I know that he lost a lot of his hair. When we came to Fort D. A. Russell, I cannot remember distinctly how long we were there before we were discharged, but I think it was about three days. That was the condition he was in when he was discharged. He had not changed much since that St. Mihiel time. After my discharge I saw him once in the last sixteen years, that is, up until now. That was when he was going through here, going to Fort Harrison. I just saw him on the train; just long enough to shake hands with him. I did not see him again until last week; I heard he was in town and in bed so I went up and saw him.

Q. How does his condition as far as nervousness compare now with what it was when he was discharged from the army?

A. Well, he might be a little more nervous. There is not much difference. I would have recognized him without any trouble. He has not changed much as far as nervousness because he always was that way.

Q. What do you mean by always was that way. What period of time do you have in mind?

A. Well, ever since the war, since the St. Mihiel and the Argonne [158] he was in the same condition. He was highly nervous, temperamental. He looked

(Testimony of Harry Hillstrand.)

a little older, but outside of that he looked a little older, but still he looked like an old man then in the Argonne.

Cross Examination by Mr. Brown:

The wagoners were equipped with gas masks at the front lines; the same kind of masks that the men in the trenches had. I stated I first noticed that he had been sick at Camp Green. I didn't see him in the hospital or infirmary at Camp Green. I did not see him in the infirmary in France. I did not see him under the care of any army physician in France. Every time that I saw him in France he was performing his duties as a soldier.

Witness Excused.

Whereupon

A. G. GILLESPIE,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is A. G. Gillespie. I live at Grass Range, Montana. I am acquainted with Carl Noble. I have known his since the fall of 1919. I am engaged in the drug business. I have been in the drug business for over thirty years. I am a pharmacist. I graduated from a duly licensed pharmacist school. That was in 1898. Since that time I have continuously practiced the profession of pharmacist. In the fall of 1919, the circumstances of my meeting

(Testimony of A. G. Gillespie.)

Carl Noble, Mr. Noble came into my drug store; he appeared to be sick; looking very pale and haggard and nervous looking, and asked me for some medicine. I will describe his condition as I saw it at that time. He was very nervous and fidgety, and he stuttered slightly and appeared to have a rather excited look, as I would say, that was from his nervousness. I prescribed for him after I had taken his pulse and temperature. [159] I will describe to the jury the type of pulse he had. I took his pulse and found that his pulse was jumpy and rather throbbing and palpitating, and the temperature——

Mr. BALDWIN: Just a moment. That is not responsive. What was his temperature?

A. His temperature, as I recollect, the first time was about one degree above normal.

Mr. BALDWIN: We will ask that that be stricken as a conclusion.

Q. What is the normal temperature?

A. 98.6/10.

Mr. BALDWIN: We shall object to examining this witness as an expert on diseases. He said he prescribed for him.

The COURT: He has not gone that far yet. I don't suppose he intends to. He seems to be inquiring the line, I expect any pharmacist would be likely to know. He has not asked what disease he had, or what his diagnosis yet.

Mr. BALDWIN: We will ask an exception.

Q. What was the temperature that you found?

A. 99.6/10.

(Testimony of A. G. Gillespie.)

Q. What medicine did he obtain, if any, at that time?

A. I put up some mixture of digitalis. As to what that medicine is used for, that slows and strengthens the beat of the heart. That seemed to correct his trouble at the time. He complained of this terrible nervousness.

Q. Can you describe in more detail his nervous condition as it appeared there to you?

A. Well, he was short of breath and very erratic in his movements in his hands, and stuttered a little and seemed pale and excited looking; his eyes were rather stary. I would judge that he was quite a nervous man, and judging from my observation, why, he [160] was suffering from——

Mr. BALDWIN: Just a moment. We object to this.

The COURT: Yes, sustain the objection.

WITNESS continuing: I saw him frequently after that. He frequently after that got medicine from me.

Q. What was the nature of the medicine that he would get?

A. His shortness of breath seemed was caused by——

Mr. BALDWIN: I object to this as not responsive.

The COURT: Yes.

Q. What was the nature of the medicine that he got?

A. I gave him digitalis; that was to strengthen the beat of the heart. I should say it was probably

(Testimony of A. G. Gillespie.)

eighteen months off and on that I gave him that medicine. As to how frequently he would get it, sometimes he got a small bottle and other times he got a little larger bottle; sometimes one every eight or ten days, sometimes one every three weeks.

Q. After this eighteen months period which you mentioned, did you see him frequently?

A. I saw him frequently, yes, but after I had been putting up this medicine for a while, I advised him to go to a physician.

Mr. BROWN: We ask that also be stricken.

The COURT: I will overrule that objection.

Q. At the time mentioned what was wrong with him, what complaint did he have at that time?

Mr. BALDWIN: We object to that as calling for a conclusion.

The COURT: Yes, sustain the objection.

Q. What physician did you advise him to go to, if you know?

Mr. BALDWIN: I object to that as immaterial.

The COURT: I will overrule the objection.

Mr. BALDWIN: Note an exception. [161]

A. Well, at first I told him to go whichever physician that he had plenty of confidence in. I said, "If you don't know any of them", I said, "perhaps you might make a trip to Great Falls", I said, "there are several good ones up there, who might give you a thorough examination."

Q. Did he go to these physicians?

Mr. BALDWIN: I object to that as immaterial.

(Testimony of A. G. Gillespie.)

The COURT: Sustain the objection. I didn't expect him to make that sort of an answer.

WITNESS continuing: At the time I referred to, there was a lady doctor in Grass Range. As to how frequently I saw Carl Noble after the first occasion on which I met him, it averaged possibly from once a week to once every two or three weeks. I can't fix the date closer than the fall of 1919. I can tell you what month it was, it was in the month of November. I had seen him before that, but he had not done any trading with me, although he was in my drug store. I did know him. I cannot say that I had observed his condition before that, because I was busy at the time, and he was just simply introduced to me.

Q. During those periods of time that you mentioned as having seen him on those various occasions, had his condition been the same or different?

A. His condition had remained very much the same, as I could see I couldn't say that there was any appreciable change either way. That has been true right up to the present time.

Q. What, if anything, did you notice with reference to his nervousness and mental condition as aforesaid?

Mr. BALDWIN: We object to this as calling for an opinion by a witness who is not an expert.

The COURT: Yes. [162]

Mr. MOLUMBY: I wish you would answer with reference to what you saw in reference to his condition.

(Testimony of A. G. Gillespie.)

The COURT: Let him describe what he did.

Q. Describe what you saw with reference to his condition?

A. One thing in particular that I have noticed, and that is the thing that I recall right now, and that was a very peculiar habit he had of expounding on his wonderful farming ability and his system of farming better than anybody else. He could raise better crops, and all that, and I thought——

Mr. BALDWIN: Just a moment. We object to what he thought.

The COURT: Yes, sustain the objection.

Q. What did you notice of that character with reference to other things that he talked about?

A. Well, just seemed to be due to his nervousness, as far as I could tell by looking at him.

No Cross Examination.

Witness Excused.

Whereupon

LOY FRENCH,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is Loy French. I live at Grass Range, Montana. I am engaged in the garage business where I have lived since 1914. I know Carl Noble. I have known him since about that time, shortly after I

(Testimony of Loy French.)

came there. I knew him prior to the war. His physical condition at that time seemed to be all right. At that time he was running a farm. I think at that time he was physically able to do all kinds of work on the farm, I believe so. I recall when I first saw Carl Noble. After the war, that was shortly after he returned. I mean by that it was perhaps within a month of his return, after his return. I will state to the jury how he [163] appeared to me when I first saw him after the war. Carl seemed to be quite a changed man when he came back from the war.

Mr. BALDWIN: We will ask that be stricken as not responsive and a conclusion.

The COURT: Yes it is. Just describe his appearance.

A. He seemed very much older. He was very excitable; stuttered a great deal; rather incoherent in his talk; disconnected in his remarks, any contact that I had with him. I recall the circumstances under which I first met him after he came back. I talked to him in the town, right after he came back within a month after he came back. As to the occasion of my conversation then, my wife had a couple of brothers in the army, and we were very anxious,—both of these boys were killed,—and we were very anxious to learn as much detail as possible about the boys.

Mr. BALDWIN: Object to this as immaterial.

(Testimony of Loy French.)

The COURT: Yes, it is immaterial. I suppose that is the occasion of his talking to him the first time.

Q. Mr. French, did talking to Carl in reference to the war have any effect upon him?

Mr. BALDWIN: Object to that as calling for a conclusion.

The COURT: Yes, technically, of course. Sustain the objection.

Q. What effect did talking to Carl concerning matters occurring during the war and overseas have upon him, if anything?

Mr. BALDWIN: We object upon the same ground.

The COURT: Yes, you will reframe your question differently.

Q. Mr. French, just describe his appearance and the demeanor when you were talking to him concerning matters that occurred during the war?

A. Well, it would upset him a great deal. He would become very excited, very upset, and his talk would gradually become incoherent [164] and disconnected. It had that effect upon him. As to how it manifested itself, if at all in a physical way with reference to his action and looks, he would use his hands a great deal; his eyes became wide and stary; he stuttered. As to how frequently I have seen Carl since that time, I have seen him off and on during all of that time. It would be rather hard for me to say definitely. As to approximately how

(Testimony of Loy French.)

frequently I would see him on the average from that time on up to the present, I would say when he was able to be around that I would see him perhaps once a week. I would see him in town usually. As to whether I would see him out on the ranch, at all, I saw him just once or twice that I was out on his ranch.

Q. When in town what was his appearance as compared to what you have already described, in reference to his appearance?

A. I couldn't see much change, unless it would be for the worse.

Mr. BALDWIN: Unless what?

A. Unless he became more excited.

Q. How does he appear now as compared to the way he appeared when you first saw him after the war?

A. Well, I think he is in worse condition than he was. He appeared in worse condition now than he did then; he is more excitable, very much more excitable. It is hard for him to contain himself any length of time. I last saw him day before yesterday. Prior to the time I came up here, I don't think I had seen him for perhaps eighteen months. I know that Carl Noble owns a car. I don't believe he is able to drive a car. I saw him driving the car but a very few times. I recognize his car when I see it. I have seen it in town on different occasions.

Q. Who was driving it on these occasions when you saw it?

(Testimony of Loy French.)

A. His wife mostly. I have never been with him in the car. [165]

Cross Examination by Mr. Brown:

I knew Noble before the war. As to how often I saw him between 1914 and 1917, I would see him perhaps once a week whenever he came to town. I cannot recall that I ever saw him out on his farm. I think I have been on his farm once or twice. He was at that time operating this farm. As to whether he was known as a successful farmer up there in that community, he seemed to be getting along all right. As to whether he was known as a good farmer up there, he was a good farmer. I could not say exactly how much of a farm he was farming at that time, because I never had any occasion to check up on his farming operations. I say that I have seen him in town many times since he came back from the army; quite a number of times. I could not say whether he was in town on his business as a Director of the Elevator Company up there. I do not know only by hearsay that he was one of the Directors of an Elevator Company up there. I learned that from just ordinary rumor. I had no way of knowing whether he was a Director or whether he was not. I believe the ordinary rumor was that he was.

Q. Now, you say you have noticed a marked change in his condition from the time you first saw him in 1919 to the present time?

A. I think he is worse than he was when I first saw him in 1919. I would not say that has been markedly apparent to me. I think it has gradually grown worse during those years.

Witness Excused.

Whereupon

CHARLES MATTSON,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is Charles Mattson. I reside at Grass Range. I have lived in Grass Range about thirteen years. I am acquainted with [166] Carl Noble. I first became acquainted with Carl Noble perhaps twelve or thirteen years ago, about 1921 I would say. That is when I first came to reside in Grass Range. I have been engaged in the barbering business in Grass Range. I do recall when I first saw Carl Noble.

Q. Just describe his condition to the jury, as you saw him and first observed him.

Mr. BALDWIN: I object to this as too remote, unless it is checked up and tied in, as he did not see him for two years after the man was out of the army.

The COURT: He can describe his condition. Overrule the objection. Let him describe his condition.

(Testimony of Charles Mattson.)

Mr. BALDWIN: Note an exception.

A. He appeared in rather poor physical condition.

Mr. BROWN: Move to strike that answer.

Q. In what way?

A. He was quite nervous when I noticed him, and excitable on occasions, and he seemed to have some heart trouble or something similar.

Mr. BALDWIN: I will ask that the last part of the answer be stricken as a conclusion.

The COURT: Yes, strike it out.

Mr. BALDWIN: And the jury admonished to disregard it.

The COURT: Yes.

Q. In what way, if at all, did his nervousness manifest itself or show itself to you?

A. Kind of shaking of the hands; just a nervous condition; impediment of speech. He would get rather excited, you know. He came into my shop quite frequently. As to what manifested his physical condition to me when he came into the shop, he was [167] rather a hard customer to work on; he was hard to keep quiet. As to whether I can think of any other incidents that would indicate anything with reference to his physical condition, that showed itself when he was in the shop, he would get quite nervous if anything unusual happened, like the slamming of a door, or something like that; if anyone would get into a discussion with him, I sometimes would have to ask him to keep more quiet until I could finish my work.

(Testimony of Charles Mattson.)

Q. Can you think of any occasions when he was in the shop, and in your chair, that would indicate whether or not he could stay there while you were cutting his hair and shaving him, with reference to his physical condition, aside from what you mentioned?

A. Yes, I have had him in fainting spells. I will describe those to the jury. He would just get pale, his color would get bad; he would get pale, and his heart would seem to pound, and on such occasions he would ask me to bring him a glass of water. In a few minutes he would seem to recover. That happened on more than one occasion in the shop. I would not say it happened frequently, but more than once.

Q. What has his condition comparatively been through the years between the time you first saw him until the present?

Mr. BALDWIN: We object to that as calling for a conclusion.

The COURT: Yes, I think so. Sustain the objection.

Q. Do you see any difference in his appearance from the time you first saw him up until the present time?

A. I think I do.

Q. What is that difference?

Mr. BALDWIN: Object to this as immaterial and too remote; fifteen years after the occurrence.

The COURT: Overrule the objection. [168]

Mr. BALDWIN: Note an exception.

(Testimony of Charles Mattson.)

A. Well, he is much weaker now than he was. He is bedfast.

Q. What if any, difference, have you noticed with reference to his nervous condition over those years?

A. Well, it is quite similar now as to what it was then.

Cross Examination by Mr. Baldwin:

I really believe I did make an affidavit for Mr. Noble. I cannot recall when that affidavit was made.

Q. Well, it was on January or February 17, 1925. Who did you make that affidavit before?

A. I don't believe that I recall who I made it before.

Q. Did you at that time make any statement with reference to a nervous condition in Carl Noble?

A. I really could not say what the affidavit consisted of now.

Q. Well, you told all the facts that you knew to say at that time, did you not?

A. I presume so. I don't know.

Q. Well, that was your purpose, was it not, to tell all you knew about the man when you made that affidavit?

A. I wouldn't say whether it was or was not.

Q. What was your purpose in making the affidavit, if it was not to tell the truth, the whole truth and nothing but the truth?

A. I believe that I told the truth at the time.

Q. Did you make any affidavit reserving anything intentionally?

A. No sir.

(Testimony of Charles Mattson.)

Q. I will ask you if you mentioned anything about his nervous condition when you made that affidavit?

A. I cannot recall. I cannot recall what the affidavit really was at that time. I don't know that I mentioned anything about [169] an excitable condition or not. As to whether I mentioned anything about a weakened condition, I cannot recall what I did mention in that affidavit. As to whether I mentioned anything about his becoming more nervous when anything unusual happened, I would not say what I said in that affidavit. I don't know that I made any mention in that affidavit about his ever having fainted in my chair. I don't know that I made any mention about seeing his heart palpitating at times, and pound.

Q. Well, did you put anything in that affidavit that corresponds with the testimony that you have given here today?

A. I cannot recall just what I did say in that affidavit.

Q. What was the object of your making an affidavit if you didn't tell the facts as to his condition.

Mr. MOLUMBY: No evidence here that he didn't tell the facts.

Mr. BALDWIN: He said he don't recall making these statements. I have covered everything that he has testified to today.

Q. Is there anything that you can recall in the affidavit that corresponds with any statement that you have made today?

A. I don't recall what I put in that affidavit. That has been some time ago.

Q. And about the only talks you ever had with Noble was concerning your condition of health, was it not?

A. His and mine both.

Q. In other words you had a mutual society that swapped notes as to the condition of each other?

A. Yes.

Q. That is about all you talked of?

A. We talked about other things. That was some of the things.

Q. You saw Mr. Noble farming in 1920?

A. Before that time, was that the question? [170]

Q. You saw Mr. Noble farming in 1920?

A. I didn't see him farming, no sir.

Q. You saw him drive a team and perform labor as late as, I believe in 1921, didn't you?

A. I saw him drive a team, yes sir.

Q. And you saw him doing farm work, or work on the farm as late as July of 1921, did you not?

A. I cannot just recall that date.

Q. Well, you have seen him doing farm labor, haven't you?

A. What do you term farm labor, I suppose.

Q. I am asking what you term farm labor, what do you call farm labor?

A. Any work pertaining to a farm.

Q. And you have seen him do that work as late as 1921, haven't you?

(Testimony of Charles Mattson.)

A. All I ever seen him was drive a team.

Q. And when did you see him drive a team?

A. I don't recall the date. I don't know what he was doing in 1918. I don't know what he was doing in 1919. I don't know what he was doing in 1920. As a matter of fact I had seen him before the latter part of 1921 in Grass Range.

Q. This is October 30th of 1934. You stated on your direct examination that you first saw Grass Range thirteen years ago?

A. No sir.

Q. What was your testimony on that?

A. I lived in the vicinity of Grass Range since 1914. I resided in Grass Range since 1921. I testified in response to the second question on my direct examination that I first met Noble in 1921.

Q. And you saw him doing farm work after you met him?

A. I saw him driving teams and work of that nature.

Redirect Examination by Mr. Molumby: [171]

I saw him driving this team in town; driving the team to town. As to the kind of lay-out he was driving, sometimes he would have a team and buggy sometimes a wagon. I never did see him doing any manual labor. I never saw him doing any labor other than driving in the buggy or wagon. I have seen him in town getting groceries. I never noticed him loading those groceries into the wagon. I really don't know whether I have seen other people loading the groceries in for him or not.

(Testimony of Charles Mattson.)

Recross Examination by Mr. Baldwin:

Q. I am going to show you your affidavit.

A. All right.

Q. To refresh your memory and then I want to ask you whether you stated in that affidavit any of the things that you have stated here, existed. The things you stated here, that he was in poor physical condition; quite nervous; excitable; on occasions his hands were shaking; that he was a hard customer to work on; that he became quite nervous on unusual happenings; that you saw him faint in your chair; sometimes he became faint and asked for water. See if you can find any one of those things in that affidavit.

Mr. MOLUMBY: Before you answer the question, I want an opportunity to object on the ground that the affidavit is the best evidence. If he is going to question it. I can put the affidavit in.

The COURT: The affidavit will be in evidence; undoubtedly will be put in evidence, if he does not, you can.

WITNESS continuing: I do not find anything in that affidavit about his having fainted in the chair. I do not find anything in that affidavit suggesting that he asked for a glass of water because of faintness in my shop, but the fact is he did.

Q. Do you find anything in that affidavit tending to show that you observed any pounding of the heart while he was in your chair being [172] worked on?

A. I believe so. It mentions the heart.

Q. Do you find anything in that affidavit sug-

(Testimony of Charles Mattson.)

gesting that he became quite nervous when anything unusual happened?

A. No sir, I see nothing here in regard to that. I don't see anything in that affidavit suggesting that he was a hard customer to work on. I don't find anything in that affidavit that states he was quite nervous. I don't find anything in that affidavit suggesting that he was shaking on occasion, but he did those things. I don't see that that conflicts. The date of that affidavit is 1925.

Mr. MOLUMBY: We asked that the affidavit concerning which counsel has been interrogating the witness be marked for identification as Plaintiff's Exhibit 1.

Whereupon that affidavit was marked Plaintiff's Exhibit 1 for identification.

Redirect Examination by Mr. Molumby:

Q. I will show you what is marked Plaintiff's Exhibit 1 for the purposes of identification, and ask you if that is the affidavit that counsel on cross examination has been questioning you. Is that the affidavit he has been questioning you about?

A. I would judge so.

Q. Is that the one that he handed to you and asked you to examine.

Mr. BALDWIN: We will admit that it is.

Mr. MOLUMBY: We offer Plaintiff's Exhibit No. 1 in evidence.

Mr. BALDWIN: We object to certain portions of it, as it is clearly evident from the testimony here that they are hearsay.

(Testimony of Charles Mattson.)

Mr. MOLUMBY: I think we are entitled to have the whole portion go in.

Mr. BALDWIN: That is the condition of Carl Noble in 1919, which [173] was two years before this witness ever saw him. He didn't meet him until 1921.

The COURT: I don't see how you now can object to any portion of it going in. You have examined so thoroughly in regard to that affidavit, unless you can show where it can be separated.

Mr. BALDWIN: Probably I can clear the matter. That is the only objection, because he swears he knew the condition of the man two years before he ever saw him.

Mr. MOLUMBY: There is the difficulty of examining a witness concerning something that is not in evidence. Then later he does not like the rest of it. I think where a portion has gone into the examination, the whole thing is entitled to go in.

The COURT: I think I will let it go in without any reservation at all.

Mr. BALDWIN: We will ask an exception.

Whereupon Plaintiff's Exhibit No. 1 was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT NO. 1

State of Montana,
County of Fergus.—ss.

I, Charles Matson, living in Grass Range, Montana, after being duly sworn, do make the following statements:

(Testimony of Charles Mattson.)

That I have known Carl Noble for many years. I know that he has had heart trouble ever since he was discharged from the army in 1919.

The reason that I know that his heart was in bad shape is that I have been troubled with sickness a great deal myself the last few years, and as usual when two sick persons get together they compare notes. [174]

Mr. Carl Noble was a frequent customer at my barber shop and I had a good chance to exchange views with him regarding our health. I know that he quit using tobacco and advised me to do the same. I also know that he was getting some medicine from the drug store for his heart.

I remember very well that he had a bad spell with his heart in June and July, 1921 and that he was unable to do manual labor after the fall of 1921, although he did drive a team a short while after this time.

He was in my barber shop the day he left for Great Falls, Montana, to have his appendix removed. As I shaved him that day I asked him if he was not afraid to undergo an operation on account of the condition of his heart. He told me he was, but that he would have to risk it anyway.

I know that he went to the hospital in the spring of 1923 and was there for six or seven weeks. He left for the hospital in St. Paul, Minn., in February, 1924 and he is still there.

The reason that I make the above statements is that I am informed that service connection of his disability has been taken away from him because

(Testimony of Charles Mattson.)

of insufficient evidence as to his heart condition prior to the appendicitis operation, and I know that he was troubled with his heart from soon after he was discharged from the army in 1919 until he left for St. Paul, Minn. and because of myself being on the sick list we often talked about his condition and my own.

I have no personal interest in his claim and am in no way related to him.

CHARLES E. MATSON

Subscribed and sworn to before me this 12th day of January, 1925.

TRUE COPY seen by me this [175] 17th day of Feb., 1925.

ANTOINETTE ZIEHER

Notary Public, Minn.

Commission expires April 11, 1930.

GEORGE BRECKINRIDGE

Notary Public, for the State of Montana, Residing at Grass Range.

My Commission expires May 1st, 1925.

Filed March 9, 1925.

Q. The witness states in that affidavit, with reference to his heart condition, explaining why the affidavit was made out, which reads as follows: "The reason that I made the above statement are that I am informed that service connections of his

(Testimony of Charles Mattson.)

insufficient evidence as to his heart condition prior to the appendicitis operation." Those facts are true.

Mr. BALDWIN: We object to that as calling for a conclusion as to whether he himself is telling the truth.

The COURT: Yes, I will sustain the objection. The affidavit speaks for itself without any other statement.

Examination by Mr. Baldwin:

How many is many with you? You say in this affidavit under oath that you have known Carl F. Noble many years. You state here under oath that you did not meet him until 1921. The affidavit is dated in 1925. The question is, how many is many to you?

A. Well, that would be quite a few years.

Q. Well, how many?

A. Thirteen years.

Q. Well, but this affidavit was made on February 17 of 1925, and there you state under oath that "I have known Carl F. Noble for many years." Is that true? Had you known him for many years on the date of the affidavit. Yes or No.

A. It tells how many years I know him.

Q. No, it don't. You say that you met him in 1921. It says that you have known him for many years, with reference to February 22, [176] of 1925. Just read it. That is the first sentence in your affidavit.

A. I read it all right, but then——

(Testimony of Charles Mattson.)

Q. I am just asking you, if you had known Mr. Noble many years at the time you made that affidavit on February 17, 1925?

A. It was not so many, but then it is an acquaintance.

Q. An acquaintance for three years. Is that many years to you?

A. It is to me.

Q. When you made the affidavit you intended that the Government should act on it?

A. I presume so.

Q. And you made it knowing that that statement was not an exact statement of fact, did you not?

A. No.

Q. Well, you had not known Carl Noble to exceed three years at the outside when that affidavit was made. Yes or No.

A. I cannot answer it yes or no.

Q. You say you met him in 1921. The affidavit is in February, 1929. You can subtract?

A. I had known him in a way before that, but not well acquainted with him.

Q. I will ask you why you said on your second examination, on your second question on direct examination that you met him the first time in 1921?

A. To become fairly well acquainted with him, but I had seen him prior to that time.

Q. But you did not know him, did you?

A. I did not say that I was acquainted with him.

Q. And in the affidavit, as well as in the second

(Testimony of Charles Mattson.)

question here today, you said that you had known him after you met him, and [177] became personally acquainted with him in both questions, didn't you?

A. I suppose so.

Q. I am not asking for suppositions. I am asking about the state of your mind. What did you intend when you said you had known him for many years?

A. Well, not many. I don't recall many.

Q. Well, there it is.

A. I see that there all right.

Q. And you also state here, "I know that he has had heart trouble ever since he was discharged from the army." Now, he was discharged from the army on July 30, 1919, and it was at least three years later before you ever met him, was it not?

A. To get well acquainted, yes sir.

Q. Well, to talk to. You never spoke to Carl Noble prior to 1921 did you?

A. I didn't say that I had not.

Q. Well, would you say that you had?

A. No sir, I would not.

Q. Would you say that your testimony is right or wrong when you said you first met him in 1921?

A. To get acquainted with him.

Q. Is that a true statement that you made here on the witness stand, that you first met him in 1921?

A. Yes sir.

Q. Tell me how you knew at the time you made your affidavit as to what his condition was on July 30 of 1919?

(Testimony of Charles Mattson.)

A. I did not know him.

Q. So that at the time you made this affidavit, you made a statement of a fact that you did not know anything about, did [178] you not?

A. No, I knew something in regard to it.

Q. Which of those two answers is right? You said "I did not know anything about it." Now you say you did. Which is right?

A. Both could be right.

Q. Which is right?

A. I say both might be right.

Q. Now, you explain how they both can be right. You did not know and you did?

A. There are some things you do not know about, and some things you do.

Q. Well, how did you know about his condition on July 30, of 1919, when you made this affidavit?

A. Well, I had been told, I presume.

Q. You had been told and you made the statement of fact to be acted on by the Government as true, something that some one else told you. Is that your idea?

A. That is not the way I expected it to be, but in reading this affidavit through, there are some things that I overlooked that is not just clear to me.

Q. You stated a short time ago that you expected the Government to act on this affidavit, as true?

A. I suppose so.

Q. You expected the Government to act on it?

A. I suppose so. It is the truth the way I see it.

(Testimony of Charles Mattson.)

Q. I am asking you what your state of mind was at the time you signed the affidavit. Did you expect the Government to act on it?

A. Yes.

Mr. MOLUMBY: The affidavit shows its purpose.

Q. You were trying to help Carl Noble get some money from the [179] Government?

A. I just wanted——

Q. Answer yes or no. You were trying to get Carl Noble,—to help Carl Noble to get some money from the Government when you made that affidavit?

A. Yes.

Q. When you came here as a witness, you are going to continue to try to help Carl Noble to get money from the Government?

A. Yes.

Q. Your purpose now is the same as it was in 1925?

A. Sure, I am trying to help him.

Q. Sure, you are trying to help him and now do you know that he was ever in a hospital in Great Falls. Did you ever see him in one?

A. I didn't see him in a hospital. I never saw him in a hospital in Great Falls or Minneapolis. I never saw him in a hospital in Helena. I never saw him in a hospital anywhere.

Q. Then why did you state in this affidavit that he was in a hospital? How did you know that?

A. The record would show it.

Q. How do you know?

A. I was told by different parties.

(Testimony of Charles Mattson.)

Q. And you made an affidavit to be acted upon by the Government upon things that other people told you?

A. They were true.

Q. And you made an affidavit to be acted upon by the Government and about which you personally knew nothing. Isn't that true?

A. I couldn't say I didn't know nothing.

Q. You did not have any personal knowledge as to whether he was ever in a hospital? [180]

A. I didn't see him there. I didn't see him go in or come out of a hospital. Whatever I knew about his being in a hospital was merely based on something that some one else told me.

Q. You stated here: "I know that he went in the hospital in the spring of 1923 and was there for six or seven weeks." You did not know anything of the kind, did you? You don't know it now?

A. He went all right.

Q. I am asking you if you know?

A. I didn't see him.

Q. That does not answer the question. Did you know it then, or not, at the time you signed this affidavit, or while you were on the stand today?

A. He surely went to the hospital.

Q. You know that because somebody told you, but the question is do you know it is true?

A. Well, I didn't see him go to the hospital, but I am sure that he was there.

Q. You don't know it, do you? You are simply basing your idea on some one else's testimony.

(Testimony of Charles Mattson.)

Mr. MOLUMBY: I don't see why he should ask these questions.

The COURT: He has a right to interrogate the witness.

Q. You say: "I know that he went to the hospital in the spring of 1923." Did you know that at the time when you made the affidavit?

A. I surely knew.

Q. How did you know it?

A. Because he told me he was going.

Q. You did not state that Carl Noble told you that he was going to the hospital in 1923, in this affidavit. You state under oath [181] that you know he went there. Why didn't you state the fact as it was when you made this affidavit?

A. I stated facts as I thought I knew them. I am fifty years old. I know that people are not supposed to make affidavits or testify excepting to things they know of their own knowledge. I have known that ever since I was a boy.

Q. Then why did you say in this affidavit instead of: "I know that he went to the hospital" that "Carl Noble told me he was going to a hospital"?

A. I did not suppose that I had to go with him to state that. I knew he was there. It is one of those common knowledge matters that he was there, and the record shows that he was.

Mr. BALDWIN: I ask that that part be stricken; the record showed that he was.

Q. Have you ever seen a record of this hospitalization?

A. No, but you can get them.

(Testimony of Charles Mattson.)

Q. Just how far will you go in testifying? You say you know the record shows it, and you never saw the record, so how can you tell us what the record shows. What do you know about that? Just tell me how you know what the record shows.

A. I don't know that.

Q. And then you say that: "He was in the hospital in St. Paul."

A. I didn't see him there.

Q. The question is, do you know that he was in the hospital in St. Paul? There is a difference between knowledge and belief. I believe you live in Grass Range, but I don't know.

A. If I have to see him there to say that I know that he was there I wouldn't say that I saw him; that he was there.

Q. You cannot say of your knowledge that any statement in that affidavit is true, can you? [182]

A. It is true in my mind.

Q. I am asking you if it is true according to the fact. Is there any statement contained in that affidavit that is true of your own knowledge?

A. If I had to be present to see those things, I could not say that it was.

Redirect Examination by Mr. Molumby:

Q. You know a lot of people that you have not met. Are there people that you know that you have not met?

A. Yes sir. That was the case with Carl Noble before I met him. I lived in that neighborhood and

(Testimony of Charles Mattson.)

I saw him. I knew who he was and just about where he lived. That was true before I actually met him.

Q. You know Mr. Baldwin here, do you not. You know who he is, don't you?

A. Yes.

Q. You never met him, did you?

A. No.

Witness excused.

Whereupon

FORBES WISEMAN,

a witness called and sworn on behalf of the Plaintiff, testified as follows, to-wit:

Direct Examination by Mr. Molumby:

My name is Forbes Wiseman, I reside in Grass Range. I have lived in Grass Range since 1910. My business in Grass Range is that of a blacksmith. I am acquainted with Carl Noble. I have known him since 1910. Prior to the time that Carl went into the army his physical condition was good; he was a good healthy farmer. From what I saw of him he was able to do any kind of work before he went. I saw Carl again after he came back from the army, I think it was about the time he first came back that [183] I saw him, the first day he came back; it might have been the day after he came back. I will describe to the jury his physical condition as I saw it when he first came back, I thought he was quite a changed man; he looked old.

(Testimony of Forbes Wiseman.)

Mr. BALDWIN: We will ask that that be stricken: "He was quite a changed man" as not responsive.

The COURT: Yes.

Q. In what respect was he changed?

A. His hair was grey and he was,—he just looked like a sick man to me. He didn't look right; quite a change in him. It showed itself to me because he was nervous and stuttered and talked with his hands, would wave around; and did not seem natural to me. He was not that way before he went into the army. As to what else I noticed about his looks, he was thin in the face; he did not look so strong as he did when he left for the army. As to how frequently I saw Carl after he came back from the army, probably not so very often, maybe two or three times, he would come down town and visit with me once in a while. I wouldn't say how many times.

Q. On the average how many times during a year would you see him since then, have you seen him?

A. Oh, probably once a week or once in two weeks, I would not say.

Q. What is his physical condition, as you see it on the other occasions that you saw him after this first time?

A. Well, just about the same. I didn't see no improvement in him I have been out to his ranch, since he came back I have been out there probably three times or four times, I don't know.

(Testimony of Forbes Wiseman.)

Cross Examination by Mr. Brown:

I say that I have known Noble since 1910. He followed the [184] occupation before he went into the army. I know where his farm is located. That is the same farm that he was on after he came from the army. Before he went in the army he was known up there as a successful farmer, good farmer. He was a good farmer. I don't know that he has been a good farmer since he came back. I have not seen him farming himself since he came back from the army. As to what I mean by saying I have not seen him farm, I will say that every time I would go up there, he was always around the house on the farm there. That has been true since he came back from the army, every time that I was up there. I was up there three or four times probably. I could not tell you how soon after he came back from the army that I did go up there. I was up there right after he came back from the army, it might have been a week, or a month; it might have been longer than that I don't remember. I was up there about three or four times, probably, more or less, I don't remember. I saw him in town often. He used to come down to visit with me generally when he came in; he was in my place of business a number of times. I don't know that his position up there as a Director in an elevator company brings him into town often. I don't know that he was a director in an elevator company. I believe I did make an affidavit as to

(Testimony of Forbes Wiseman.)

Noble's condition, and sent it into the Veterans Bureau. That is my signature on there. This affidavit was made on the 13th of September, 1924; that is correct, it must be. At that time, when I made this affidavit, his hair was grey. In 1924, it must have been after he came back from the army; right after he came back from the army. When he came back from the army his appearance was as I have testified today from the witness stand.

Q. Now, will you read that over, your affidavit, and see if you said anything in that affidavit about his hair being grey, or if [185] you said anything in that affidavit about those things that you have mentioned as to his condition from the witness stand today?

A. You want me to mention some of them?

Q. No, I just want you to say whether or not you said in that affidavit that his hair was grey. Do you say anything in there about his hair being grey?

A. Not a thing.

Q. Do you say anything in that affidavit about stuttering?

A. Not a thing.

Q. Do you say anything in that affidavit about his hands waving around?

A. Not a thing.

Q. Do you say anything in that affidavit about

(Testimony of Forbes Wiseman.)

his being nervous?

A. I believe I did.

Q. Read it over again and see.

A. He was very nervous.

Q. And of all the things that you mentioned today, the only thing that you mentioned in that affidavit was that he was nervous. Is that true?

A. Yes.

Redirect Examination by Mr. Molumby:

Q. I will show you what I have had marked Plaintiff's Exhibit 2 and ask you if that is the affidavit that Counsel has been talking about?

A. Yes sir.

Mr. MOLUMBY: We offer Plaintiff's Exhibit 2 in evidence.

Mr. BROWN: We object to it as incompetent, irrelevant, and immaterial, the exhibits being used by the Defendant on Cross examination simply for the purpose of refreshing witness's memory, not for the purpose of proving any fact therein contained. [186]

The COURT: You used this to suit your purpose, and we will let it go in evidence for what it is worth.

Mr. BROWN: Note an exception.

Whereupon Plaintiff's Exhibit No. 2 was received in evidence and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT NO. 2.

State of Montana,
County of Fergus—ss.

I, Forbes Wiseman, being first duly sworn state: That I started a blacksmith shop in Grass Range, Montana in 1910, and that I have known Carl F. Noble ever since I have been here. Before enlisting in the army Carl F. Noble was one of the hardest working men I ever knew. After his return in the fall of 1919 I know that he was unable to do anywhere near as much farming as he did before the war. When I asked him what was the matter he told me that he would get tired and short of breath on very little exertion, and that he had a pain in his left chest. I know that he stopped using tobacco thinking that it might help him. I know that he has been unable to do any work at all since the spring of 1922, and that several months before this all he was able to do was drive a team as his heart was a great deal worse whenever he tried to do manual labor. Carl F. Noble has had to hire all his farm work done since this time (Spring, 1922). He was very nervous if there was the least bit of excitement and would complain a great deal about pains in his left chest. About this time I disposed of my blacksmith shop and bought a pool hall. Carl F. Noble would often stop in my place and while I never knew him to play pool he would quite often play a game or so of cards. Sometimes he would have to

(Testimony of Forbes Wiseman.)

stop right in the middle of a game on account of his heart—he would grasp [187] his throat and go outside for air. He has had to take medicine and go and see doctors off and on ever since he has been out of the army. He was in a hospital in Great Falls, Montana in the summer of 1922 for appendicities, and the government hospital at Helena in the spring of 1923, for his heart. After he left the government hospital at Helena he had to stay several weeks in a hotel at Grass Range before he was able to go out on his farm. In February he was sent to St. Paul, Minnesota to the government hospital.

I have no personal interest in Carl F. Noble's claim for compensation and am not related to him. If he is in need of any more evidence it can be secured from any one in this community as every one here knows him, and knows that he has been unable to carry on his work because of his heart condition.

FORBES WISEMAN.

Subscribed and sworn to before me this 13th day of Sept., 1924.

(Notarial Seal) R. B. VOOMAN,

Notary Public, for the State of Montana, residing at Grass Range, Montana.

My commission expires 5-3-27.

Filed: October 16, 1924.

(Testimony of Forbes Wiseman.)

Recross Examination by Mr. Brown:

Q. Did you say, Mr. Wiseman, that you only had been out to his ranch three or four times since he got back from the army?

A. Since he got back from the army; might be more or less; three or four times. I think now it was three or four times. I said that every time I went out there I found him around the house. He was not working.

Q. Well then, Mr. Wiseman, when you told the government in this [188] affidavit that after his return in the fall of 1919: "I know that he was unable to do anywhere near as much farming as he did before the war", how did you know that he had been doing any farming?

A. I know he didn't do it. I know he told me he was not working. He was not working when I went up around there.

Q. You say here in this affidavit that he was doing farming, and you say that he could not do as much as he did before the war. What did you base that upon?

A. He was farming, but he was doing it with hired help. Any time I was there he had hired help to do it.

Q. You say here, after his return in the fall of 1919, "I knew that he was unable to do anywhere near as much farming as he did before the war." You did not put in there what farming he was doing?

(Testimony of Forbes Wiseman.)

A. With hired help?

Q. He was doing it with hired help?

A. What I said is in that paper. He started farming right after he came back with hired help. I am sure of that. As to whether I am just as sure of that as I am of the rest of my testimony in this case, I may be off a year or two. Wait a minute. It is a long time to remember back for me. His brother was with him, his brother Ferd Noble was there then. I never knew him to do any work after he came back from the army. Not what I call labor. There is lots of different farm work. I did not know him to do any farm work after he came back from the army, I didn't see him doing any.

Q. What is the fact as you know it to be, whether he did or did not do any farm work after he came back from the army?

A. He might have. I never saw him. [189]

Q. Did you know on the 13th of September, 1924, whether he ever done any farm work since he came back from the army?

A. I never seen him. I never saw that at all.

Q. What did you mean when you said in this affidavit: "I know he has been unable to do any work at all since the spring of 1922."

A. That must have been when he came back from the army.

Q. What did you mean by that. You say here: "I know that he has been unable to do any work at all since the spring of 1922."

(Testimony of Forbes Wiseman.)

A. That must have been when he came back from the army, I suppose. I don't remember.

Q. What did you mean by that answer that you gave?

A. I never see him doing any work when I was around there.

Q. Why didn't you say that in the affidavit? You say that you know that he has not been able to do any work since 1922?

A. Probably that word "knew" might be a bad word in there.

Q. I believe it is.

A. He might have done it while I was not there. In here, that up until the year 1922 that he could work, and after that he couldn't work?

A. Not to my knowledge.

Q. Now, you don't know what you meant by that, is that true?

A. Yes, I do. I know what I meant.

Q. Tell me what you meant,

A. That as far as I seen him, he was never able to work, my judgment of the man. I have seen him come to town driving a horse. I have seen him drive a team, I saw him come to town with a wagon.

Q. Now, you say here he was in the hospital in Great Falls, Montana, in the summer of 1922."

A. That must be right. I did not see him in the hospital here. I did not see him here. [190]

Q. You said that he was here for appendicitis?

A. That is what he said he was here for. I didn't see him. I did not come up here to see him.

(Testimony of Forbes Wiseman.)

Q. You said in this affidavit he was here?

A. He must have been.

Q. Didn't you say he told you that he was here?

A. I didn't say that.

Q. "In the governmental hospital at Helena in the spring of 1923 for his heart." Do you know whether he was in the Government hospital?

A. No.

Q. Did you see him?

A. No, I knew he was supposed to go there. He told me himself, and neighbors that he was going over there.

Q. And he told you he was going to Great Falls. Is that true?

A. It must be.

Q. You were swearing to this affidavit before the Government, to something he told you, and you did not know anything about it of your own knowledge. Is that true?

A. I knew that he was here. I know this is Tuesday. I know he came over to Great Falls to the hospital. The neighbors had seen him and knew he was here. I don't remember that I saw him get on the train. I said I did not see him in Great Falls. I said the reason that I knew he was here was because he told me that he was here.

Q. You were willing to swear in this affidavit to something he told you?

A. I knew he was over here.

(Testimony of Forbes Wiseman.)

Q. Answer my question. I say you were willing to swear in this affidavit to something you didn't know of your own knowledge, [191] only what Noble told you. Is that true?

A. Must be.

Witness Excused.

Whereupon

MRS. CARL NOBLE,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is Mrs. Carl Noble. I am the wife of the Plaintiff in this action. I live at Grass Range. I have a family, I have two children, as the issue of the marriage between Carl and myself. I first met Carl in the Aberdeen hospital in St. Paul, I think it was 1924. I know he was in the hospital. I saw him there. He was in room 24 in the medical ward. As to whether I know how long he was in the hospital at that time, he was there nine months or a year. I think he was in bed nine months while I was there. I am employed at that hospital. I was a United States Veterans Bureau Nurse in the Veterans Hospital. I will describe his condition as it appeared to me at that time. Carl was very nervous, that is one thing. He could not be in a ward where there were a lot of other patients. First

(Testimony of Mrs. Carl Noble.)

he was in a two bed ward. We didn't have any single bed wards except for——

Mr. BALDWIN: I will object to this as not responsive.

The COURT: It is describing his condition.

A. He was there for heart condition. He was in with another heart patient who was very ill at times.

Mr. BALDWIN: We will ask that that be stricken as not responsive.

Mr. MOLUMBY: The latter part is not.

The COURT: It is not responsive. It may be stricken.

WITNESS continuing: They later moved him into a new ward; they had to move him out; made him nervous, this other man. As to how his nervousness manifested itself at that time, he could not [192] sleep; his hands shook; eyes were staring, excited, could not stand this one and that one; he could not stand certain patients that would come into the room; we had to keep them out; they would get on his nerves. As a nurse I was taking care of him part of the time. I remember taking hold of his hand; it was the softest hand I ever held at that time. That was his condition all of the time during his hospitalization there; he was in bed most of the time. After he was in the hospital at Aberdeen, I again met him; he came back to see me the year before we were married. That was in 1927, that is, the fall before. His condition at that time was about the same; he was very nervous.

(Testimony of Mrs. Carl Noble.)

Q. What did you notice when you first saw him back there in the Aberdeen hospital, concerning his condition other than his nervousness?

Mr. BALDWIN: We object to this. If he is calling for a medical opinion from a nurse not qualified.

A. Well, his color, of course, was awful white, and his eyes were poppy. I noticed something else with reference to his condition at that time, and his appearances; he was on a special diet. I know that he was hospitalized at that time for his heart condition and nervousness. His color at that time was yellow white, I would call it. When he came back to call on me in 1927, the things that I have recalled concerning his condition at the time he was hospitalized there still existed. I again saw him before we were married; he came back over there in the spring. We were married that spring. He was still in the same condition. Since then I have resided all the time at Grass Range. I have lived out there on the ranch. Carl has not done any work on the ranch since I have been out there. As to whether he has done any work of any kind since I first knew him, he [193] would try to put up a shelf in the house, and he would have to call on the hired man to finish it. As to what his physical condition has been during the time since we have been married: He has been very nervous. He has not been able to sleep; he has had very bad nightmares; he yells and screams. I have to waken him to get him

(Testimony of Mrs. Carl Noble.)

over it. As to how it manifests itself in the daytime, he cannot stand it any more, and goes and throws himself down on the couch and says: "I cannot stand it." As to what he is referring to, if he tries to do something that does not work, he just gets disgusted. As to whether his nervous condition manifests itself in any other way, we cannot have a radio; we tried a new radio out, but the noise was too much. He cannot drive a car. I drive the car. As to whether he ever attempts to drive it at all, he tries to; he gets nervous when I drive, or he used to, we had to quit driving the car. We had to quit driving the car because it got on his nerves.

Cross Examination by Mr. Baldwin:

As to how long I had been practicing as a nurse when I first met Carl Noble, I did nursing in 1919. I graduated in 1918. I graduated from the Augustine Hospital at Chicago. I had three years of training prior to graduation; that was the required course. I took the necessary graduation and received the necessary certificate. That was in 1918. I first met Carl Noble in 1924. I had been practicing my profession from my graduation and certification in 1918 until the time I met him, that is, off and on. As to how much experience as a nurse I had during that six year period I had been working all the time. I don't know just what you want to know.

Q. I just want you to tell what the truth is concerning the question I asked. How much nursing

(Testimony of Mrs. Carl Noble.)

you had done between the time [194] of graduation and certification until the time you met Carl Noble in 1924?

A. I was not nursing all the time, but I had different work, and there would be a week or two or a month between times when I was not. In other words I had been practicing my profession constantly during that six year period except for a month or two in between different work. During those years I did work as a nurse. I did private duty, as we call it, in the Augustine Hospital; private duty means taking care of special cases.

Q. In other words you were not employed as a general nurse, but as a private nurse, had private patients to care for?

A. That was for a time. Then I did general duty nurse. I did general nursing at the university hospital in Minnesota. I think that was about six months. Then I did Red Cross work. I was instructor of nurses for the Red Cross. I did home hygiene and caring of the sick. I don't know how long I continued that work. I think that was two years but I don't remember. As to where I went then, I was in the same line of work. I did county nursing for the Red Cross. It would be on the same order only I went from school to school. Before this I had women and instructed them in it. In other words I was an instructor in nursing. When I graduated as nurse I was twenty-three or twenty-four years old I guess; twenty-four I believe.

(Testimony of Mrs. Carl Noble.)

Q. And you met Noble in 1924? Had been graduated six years; had six years' experience as a nurse and were thirty years old?

A. I don't know how old I was then. I had not thought of it.

Q. I am asking you. That is a fact, is it not?

A. I had been nursing up to then. I don't remember my age at that time. I did not say I was eighteen years of age when I graduated; I graduated in 1918. I was twenty-three or twenty- [195] four years of age, and I had six years of practical experience at the time I met him. That was in 1923 or 1924. I am not sure whether it was 1923 or 1924. I think it was 1924.

Q. Your statement was that you met him in September of 1924 for the first time at the Aberdeen Hospital.

A. I didn't say September.

Q. All right, give us your best recollection.

A. I didn't say September because I don't remember that.

Q. All right, give me your recollection.

A. It was in 1924, I think, let's see. I have to stop to think; it was 1924.

Q. And you say he remained under your care as a nurse for approximately nine months?

A. Not all the time. I was in the hospital, but they shifted us around. We are not on the same ward all the time. I was there a good deal of the

(Testimony of Mrs. Carl Noble.)

time. I knew that he was there at that time, and I waited upon him during a part of the time.

Q. And became infatuated with him, or got in love with him, I suppose. Is that true?

A. Do I have to answer that question?

Q. I want to find out about these things?

A. Why do we marry, as a rule?

Q. I was wondering how long the courtship had been carried on?

A. It would have been that length of time, would it not?

Q. You say you were married in 1927?

Mr. MOLUMBY: 1928, she said.

Q. Now, at the time you were nursing Carl Noble, you knew all the facts of life?

A. Nobody knows all the facts of life.

Q. But you knew most of them from the physical standpoint, the [196] standpoint of health, and the need of it, and the marriage relationship, you understood perfectly?

A. I wouldn't say that. I don't think that anybody——

Q. You understood them as well as the average graduate nurse with six years of experience in nursing?

A. Yes, indeed.

Q. And certainly you would not have made love to, or allowed a soldier, or anybody else that was not in reasonable physical condition for marriage to make love to you?

(Testimony of Mrs. Carl Noble.)

A. I don't know about that. As a nurse we learn to see further than the physical; we see something beyond.

Q. I suppose all of us see something beyond the physical in courtship, and love, that is natural, but you knew that Carl Noble was not in a fit state for marriage, did you not, because of his health?

A. I wouldn't say that.

Q. When you were nursing him during that nine months' period, he was in a hospital, and you nursed him part of the time and you considered him fit for marriage.

A. Well, I was not thinking about marriage then. I was taking care of Carl. I would say that at that time he was wholly unfit to do any work of any kind, he certainly was; that is while he was in the hospital. When he left it I would say he was wholly unfit to do any work of any kind. As to how long I thought that condition was going to continue, I did think there would be much change in him. I did correspond with him during the four year period between that and the marriage. I did not see him during that period.

Q. And you married him in 1928?

A. Yes, I saw him in 1927. He came back in 1927. [197]

Q. Did you consider him at that time in a fit physical mental and nervous condition, to assume the marriage responsibilities?

A. When it comes to marriage—

(Testimony of Mrs. Carl Noble.)

Q. I am asking you a question. I would like to have you answer that question. Did you consider him at that time in a fit physical mental and nervous condition to assume the marriage responsibilities?

A. I married him.

Q. Well, I am asking you as to your opinion as to his condition at that time. You qualified as an experienced nurse?

A. I didn't form an opinion on that score, perhaps. My age in 1927 was thirty-three. At that time I had had eight years of practical experience as a nurse in hospitals and in private employment, and I did not stop to consider the physical mental or nervous state of the man that I was expecting to marry. That is true.

Q. As a part of your training as a nurse before graduation, and a part of your experience in the hospitals, and in nursing, you knew that even if men were not physically mentally and nervously fit, that they were risks in marriage.

A. Any man is a risk in marriage.

Q. Yes, I think that is true, but if the physical, mental and nervous state is below normal, he is apt to be a greater risk?

A. He has character. That is more than some men have.

Q. I am not asking you about that. I don't care to argue with you. Now, I want an answer to the question that I asked you?

(Testimony of Mrs. Carl Noble.)

A. Yes, yes. At the time I contracted the marriage with Carl Noble I expected to bring children into the world.

Q. Did you learn as a part of your instructions by graduating as a nurse, and also from your experience in nursing, during that [198] period that a man, who was below par, normal, would be an improper father, or would be apt to be?

A. He would be apt to be, I suppose. That is possible, yes.

Q. There was more probability of that result in a man below normal mentally, than there would be in the average man?

A. I don't know.

Q. That was your opinion, was it not, from reading and studying and observation. I suppose you studied eugenics during your course?

A. Yes. Eugenics taught me that a man below normal was not apt to be a fit husband or father.

Q. And studying eugenics, and other subjects allied nursing, and things of that kind, taught you, did it not, that a man whose nerves had been shattered was apt to be an improper father?

A. No sir, not improper; indeed not.

The COURT: I think you have carried this examination far enough. This woman said, she didn't take those things into account in the marriage relation, or getting married. I will stop it right here.

Mr. BALDWIN: Exception noted.

(Testimony of Mrs. Carl Noble.)

The COURT: You have gone far enough.

Mr. BALDWIN: I will save an exception, and prepare an offer of proof.

The COURT: Anything further from this witness?

Mr. BALDWIN: I wish to make an offer of proof.

The COURT: You can make an offer of proof in the absence of the jury.

Mr. BALDWIN: I was trying to follow the rule, which requires that I put it in writing.

The COURT: All right.

Mr. BALDWIN: Mark this offer of proof, Defendant's offer of proof No. 1. [199]

Whereupon said offer was marked "Defendant's offer of proof No. 1".

Mr. BALDWIN: Defendant now offers to prove the facts as stated in Defendant's offer of proof No. 1, by the witness on the stand.

Mr. MOLUMBY: We wish to object on the ground that the line of inquiry does not tend to prove that offer of proof.

The COURT: I will permit you to ask that question, certainly.

Q. At the time you married Mr. Noble, did you consider him below normal mentally?

A. That is a hard question to answer.

Q. It can be answered. You know what your mind was at that time.

A. Below normal mentally?

(Testimony of Mrs. Carl Noble.)

Q. Yes, less the average mentality.

A. Why no, I wouldn't say that. I did consider him below a general average, or below normal nervously.

Q. To what extent?

A. I don't know that you could put that out in degrees, or extent.

Q. It must have some division in degrees, or some way of expressing it, cannot you answer the question?

A. Not that kind of a question, no. I don't know what you mean. I considered him below normal physically, that is below the average. As to what extent, I knew that he was a nervous case and also a heart case.

Q. Well, the question is to what extent did you think he was below the normal, nervously?

A. I don't know how to answer that.

Q. I cannot put the answer in your mouth. It is your testimony. What was your feeling. That is all I can ask?

A. There is not much. [200]

Q. Under what degree did you believe that he was under normal at the time of marriage?

A. He was nervous.

Q. To what degree under normal?

A. I never classified him in degrees. I don't know what I would say.

Q. At the time you married him, he was a strong well nourished man was he not?

A. What is that?

(Testimony of Mrs. Carl Noble.)

Q. He was a well nourished man at the time you married him?

A. Well nourished,—I wouldn't say that, no sir.

Q. Will you just tell me how he appeared to you. Normal or abnormal, or under normal?

A. Under normal.

Q. Physically.

A. Under normal physically at the time, yes sir.

Q. At that time I take it you did not have independent means to provide for you and he?

A. Well, I was not destitute by any means.

Q. You were not rich enough to provide a home for him and you what I am trying to get at. Did you believe at that time that he would be wholly unable to make a living for you?

A. I didn't count on that. I did not figure on that. I knew I could work.

Q. Well, you have not had to work since you married him, that is except in the home. I understand that the mother and wife always works longer hours than we men do. Outside of the home you didn't work?

A. No sir.

Q. Outside of that Carl Noble has provided you and the children [201] with a home and the necessaries of life?

A. I had a little legacy come in; that is my folks had some and I have been getting some every year. We borrowed off of my insurance and things like that.

(Testimony of Mrs. Carl Noble.)

Q. At the time you married him you did not think that he was wholly unable to carry on any gainful employment?

A. I told you I had not counted on that.

The COURT: I will object to this myself, if counsel don't. She has answered that question two or three times now. She said she didn't have those things in mind when she got married.

Q. Did you expect at that time that his condition was such that he would be always unable to carry on any gainful employment during the rest of his life?

A. It was possible. As I say——I was not——

Q. That does not answer the question.

A. Oh yes.

Q. And you thought that when you married him?

A. Yes I knew that.

Q. How had he earned a living for you and himself?

A. He has been drawing compensation, and, as I said, we borrowed all we could.

Q. You borrowed for the purpose of buying more land, didn't you?

A. Oh my no; we have not bought any land since. I should say not. He has not increased the land that he owned. We just existed.

Q. That is the way with all of us. Did he make any profit on the farm?

A. There has not been any while I was there, no, and all the machinery is worn out, and every-

(Testimony of Mrs. Carl Noble.)

thing, we have not been able to replace. We have not put any mortgage on the land. We have not [202] put any mortgage on the 45 head of cattle that are on the land. We have had a crop on that land each year, but we have had to hire it put in. We have had a small crop each year. We did not sell it each year, we fed it up to the cows, and to the cattle. You said 45 head, we have not had that many all the time. There was not a very great profit from that. We have not been able to pay the taxes on what we get from the land. As to how many acres each year have been planted and harvested on that farm, each year that is going to be hard for me to tell. I can tell more about how much we have gotten off from it.

Q. Have you any definite recollection as to how much they got off the farm every year since your marriage?

A. Yes, last year we got,—that is, how many bushels do you mean?

Q. I don't know whether you figure it in tons or bushels, or dollars.

A. There has been no profit. We have had to borrow to the limit, but last year I think we threshed 537 bushels of wheat. I don't know what the yield was in 1928. One year we had 230 bushels, we threshed 230 bushels. That was 1931, I believe.

Q. Can you tell me how many cattle were sold off the ranch in any year?

A. In each year, or any year?

A. Oh, the average of two or three years; young stuff.

Q. Can you tell me how much money Mr. Noble deposited in the bank in any year since your marriage?

Mr. MOLUMBY: We object to that as not proper cross examination.

The COURT: I think so. Sustain the objection.

Mr. BALDWIN: Note an exception.

Witness excused.

Whereupon

FERD NOBLE,

a witness called and sworn on behalf of [203] the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is Ferd Noble. I am a brother of Carl Noble, the Plaintiff in this case. I live at Grass Range. I have lived down there for seventeen years. When Carl went away to the army his physical condition was good. Carl at that time was living at Grass Range. We were living together, Carl and myself; running a ranch together down there. Carl was able to do any and all kinds of work on the ranch. He was as good a hand as I was. After he came back from the army, his physical condition was such that he was nervous; he looked peaked. One thing I noticed most was the condition of his hair. When he left, as far as I know, he didn't have

(Testimony of Ferd Noble.)

a grey hair in his head but when he came back his hair was white. As to what else I noticed with reference to his nervous condition, he looked kind of worn out; he was nervous and looked peaked. As to how he showed this nervousness he talked and kind of stuttered, and he could not hold his hands still. He did not stutter before he went to the army. When he first came back he went home, to this same ranch that we occupied before the war. As to whether he did any work there when he came home, that fall I had the place, we were harvesting, and I finished up the harvesting, and I had another man there. He did no work towards that harvesting at all. That was in the fall of 1919. That winter there was very little work to be done on the ranch. We had very few cattle; there was a few cattle; they were running on the straw piles. I was living in the same house with Carl that winter; we lived together that winter, most of the winter. I went out and worked out some that winter. There was practically no work to be done on the ranch during that winter. In the spring of 1920 I put in the crop that spring. [204]

Q. How big a crop did you put in?

A. We put in a pretty good crop in 1920.

Mr. BALDWIN: We object to that as uncertain, and ask that it be stricken.

The COURT: Yes.

Q. How many acres?

(Testimony of Ferd Noble.)

A. Well, we put in between two hundred and three hundred acres. I cannot say for sure.

Q. Did you put in the crop alone, or did you have help, in 1920?

A. I done practically all the heavy work.

Q. Did Carl do any of the work?

A. He was around some.

Q. Was he able to do any plowing and disking?

A. He drove the team some.

Q. And how did that affect him, if at all?

A. Well, he could stand it for a while, then he would have to quit; he would have to lay off; that continued all spring. As to how long a period he would be able to work, he might work a day at a time, and maybe could not work a day at a time. If he worked a longer period than a day, he would be worn out. As to the type of work that he attempted to do that spring of 1920, he did some harrowing, but I did practically all the heavy work.

Mr. BALDWIN: We ask that the last part of the answer be stricken as not responsive.

The COURT: Yes, it is not responsive.

Q. Now what, if anything, other than harrowing did he do in the spring of 1920?

A. I don't remember as he done much of anything of the work, maybe that was 1920. There was quite a lot of summer fallowing in 1920. That was done in 1919. That summer fallowing was prepared before [205] Carl came back from overseas. That summer fallowing consisted of somewhere around seventy acres.

(Testimony of Ferd Noble.)

Q. And aside from that seventy acres, how many acres did you put in, in the spring again in 1920?

A. Well, I don't just remember, but we put in some spring crop.

Q. And was it all on the place that Carl owned?

A. I don't remember whether it was all on that place or not.

Q. Did you have some crops that year on some other place?

Mr. BALDWIN: We object to this as leading.

The COURT: Yes.

Mr. BALDWIN: And assuming conditions that are not shown in the evidence.

In the spring. After Carl came home, state just what the crop was you put in that spring, if you can recall?

A. Let's see. We put in that seventy acres. I think the crop was all on his own place but I won't say for sure. There were about seventy acres summer fallowed, and eighty acres of spring wheat; about one hundred and twenty acres in spring wheat, I think. Beside the seventy acres of summer fallow. As to whether I had any help to put that crop in that spring, I put that crop in practically all myself. Carl did not do anything towards putting in the crop other than what I have already testified to. The summer or fall of 1920, I did practically all of the harvesting. We had help during the harvesting season. During the harvesting season we had one hired man. As to whether Carl did any of the

(Testimony of Ferd Noble.)

harvesting, he did the cooking, mostly the cooking. In the year 1920 there was summer fallowing done; there were about forty acres summer fallowed, if I recollect rightly. I did that summer fallowing. Carl did practically none of the work of summer fallowing that fall. [206]

Q. And in the spring of 1921, how big a crop did he put in?

A. 1921, we put in that summer fallow and about thirty acres, that is in the spring. That summer fallow was put into winter wheat, and in the spring we put in about thirty acres more. I planted the winter wheat on the summer fallow. As to who planted the spring wheat in the spring, Carl started to plant that, and then I finished it up. It took a little better than two days to seed that place. Carl worked at it about half a day.

Q. And did he quit then at the end of the half day?

Mr. BALDWIN: We object to that as leading.

The COURT: Yes.

Q. Do you know why he quit?

Mr. BALDWIN: Object to that as calling for a conclusion.

The COURT: He may answer.

Q. Answer yes or no, whether you know why he quit?

A. Because he was not feeling right. In 1921 I helped some in harvesting that crop, and he had some hired help. The hired man that he had was

(Testimony of Ferd Noble.)

Bert. Ingram. There was some summer fallowing done on the place the summer of 1921. He had Bert Ingram do some of it, and I done some of it. I don't remember how much I summer fallowed that summer and fall of 1921, I think it was probably about fifty acres.

Q. And then the next spring, who, if anybody, put in the crop and that summer fallow, or was it put into winter wheat?

A. That summer fallow was put into winter wheat. I did the drilling and put in the winter wheat. Carl did practically nothing toward the summer fallowing that year. As to whether he did anything toward the planting of it, or seeding of it to winter wheat, I think Bert Ingram, but I won't say for sure, but I think Bert Ingram seeded that, but I won't say for sure. I don't think Carl seeded [207] it.

Q. Why is it that you are not sure?

Mr. BALDWIN: Move that it be stricken. He was asked if he knew and he said he did not.

The COURT: Yes that is true. Strike it out.

Q. What is it that you are in doubt about?

A. I don't know. I can't remember whether Carl done it, or whether the other man done it. There were about fifty acres to seed. It would take a man probably close to four days to seed that. That next spring, the spring of 1922, there was some spring wheat put in beside the crops that were put in on that summer fallow, I think there were about thirty acres. As to who prepared the ground to seed that,

(Testimony of Ferd Noble.)

in 1922, I did part of that work. I don't remember who the other man was that they had there. There was another man there that spring.

Q. Did he also assist in putting that crop?

Mr. BALDWIN: We object to that as leading.

The COURT: Yes, but we have got to get through with this sometime, if we can. Why cannot you hurry it up? It is not necessary to go into all these details to find out whether the Plaintiff did any work there.

A. I know that Carl did some work toward putting in the crop that year. I couldn't say how much work he did do, that is in 1922 he was sick in the spring; he laid off some. I don't remember how much work he did. In 1923 I know that he did not do any work; nor in 1924. He has not attempted to do any work since 1922. As to what his physical condition has been during the years between 1919, when he came back, and 1922, it has been no good. His condition during those years has not been any different than what I have already described to the jury. Since 1922, as compared [208] to the time before 1922, he may be a little more nervous. During those years since 1922 he has been in the hospital, or away from the ranch. Sometime he has been the hospital. I cannot state what the dates are. It has been on more than one occasion.

Cross Examination by Mr. Brown:

I don't know that Carl was any better farmer than the average farmer before the war. I guess he

(Testimony of Ferd Noble.)

did understand the farming operations before the war. I know he was farming before the war. He knew how to manage a farm, or run a farm. I was not living on this farm in 1923; nor in 1924; nor in 1925. I was not living on that farm any year after 1925. I was living on the farm when my brother came home from the war. After he came home from the war I made my home on that farm until the fall of 1923. I stated that in 1920 my brother did not do the plowing and seeding on the farm. If he said in his deposition that he did, I would say that he didn't do it all. He did not do the largest portion of it in 1920; I did the largest portion. I stated that I moved off in the fall of 1923.

Q. Did you and your brother have a division of some of that land that you were farming there?

A. What do you mean? Before 1923, do you mean?

Q. No, when you moved off, you did not divide?

A. Not that land, no. After I moved off the farm, my brother had the whole place, whatever it was. He did buy some other land. I think it was about two hundred acres. I would say for sure when he did buy that other land, I think it was 1925. I guess he added to his livestock.

Q. I am just trying to get the best of your judgment. You think it was 1925 he added to his livestock there, didn't he? [209]

A. In 1925?

(Testimony of Ferd Noble.)

Q. No, since he came back from the war, he has lived there and occupied that as his home, ever since he came back from the war?

A. Outside of when he was in the hospital. He came back there in 1919. He came back in the latter part of July. He lived all of 1919 there, and he lived all of 1920 there. I don't know about these times, he went to these hospitals. I never did go to a hospital with him. I did see him in the Lewistown hospital. He was in the Lewistown hospital in the spring of 1933, I believe. That was the only hospital I ever saw him in was the Lewistown hospital. I cannot say how much of the time he was away from home since he came back from the war. I don't know how long he was in the hospital. I never saw him in those hospitals, outside of the Lewistown hospital.

Witness excused.

Whereupon the hearing was continued until Thursday morning, October 31, 1934, at 9:30 o'clock.

Thursday, Nine Thirty o'clock, October 31, 1934.

Whereupon

MRS. CARL NOBLE

was recalled as a witness on behalf of the Plaintiff, and testified as follows:

Direct Examination by Mr. Molumby:

As to where Carl was in the spring of 1933, Carl was very sick, and had to be taken to the Lewistown

(Testimony of Ferd Noble.)

hospital. He was there two weeks, and from there he was transferred to the United States Veterans' Hospital at Helena. He was in the hospital at Helena for nine months. At the expiration of those nine months he was taken home, because I was a nurse and could take care of him. I remember when he was brought home, it was just after Thanksgiving day. He was brought home on a stretcher. We have a wheel-chair, and we have been laying him down on that. I have put [210] him out in the sun, the warm days in the sun.

Q. How did you bring him up here? Is he in Great Falls?

Mr. BALDWIN: I object to that as immaterial, and for the purpose of creating sympathy.

The COURT: Yes, I will sustain the objection.

Q. Where is Carl now?

Mr. BALDWIN: We object to that.

The COURT: I think it is understood that he is sick in the hospital and not able to be here.

No Cross Examination.

Witness excused.

Whereupon

DOCTOR ALRED,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

I am the Doctor Alred who has already been sworn in this case. My full name is Ivan Alred.

(Testimony of Doctor Alred.)

I reside in Great Falls. My profession is that of a physician and surgeon. I have practiced that profession for several years. My practice has been in Great Falls.

Q. What school, if any, did you attend?

Mr. BALDWIN: We will admit the qualifications of the Doctor.

WITNESS continuing: I am acquainted with Carl F. Noble. I have examined him in my professional capacity. I made that examination last Friday evening.

Q. And will you state to the jury just what your findings were, upon your examination of him?

A. I was asked to see Mr. Noble to see if his condition was such that he might come into court.

Mr. BALDWIN: I object to that as immaterial.

The COURT: Yes.

Q. Just state what your findings were. [211]

A. I found a very sick man; a man who was too weak to stand unassisted; anemic, nervous; stuttered in trying to answer questions; complained of a multitude of symptoms including vomiting, palpitation, weakness, loss of appetite or no appetite. I don't know of any more complaints. I found upon my physical examination of him an anemic man that was unable to stand unassisted; who has gross tremor of the hands or other muscles; the legs are very atrophied, from disuse. He has a distinct stutter or imperfect speech when asked a question;

(Testimony of Doctor Alred.)

and from his history I found it difficult to get any intelligent history. He has thought his symptoms so long——

Mr. BALDWIN: We object to what he thought about it, as a conclusion.

The COURT: Yes, that is a conclusion. Strike it out.

A. In answering questions as to what he complained of, he stated things which were not explained, making it difficult to state what his complaints really are. As to whether I examined his pulse and heart, I did not examine him that evening, but at a later date I examined him, comple physical examination.

Mr. BALDWIN: That examination was for the purpose of testifying was it not?

A. The later examination was for the purpose of testifying.

Mr. BALDWIN: I object to that as incompetent, irrelevant, and immaterial.

The COURT: What part of it, all of it?

Mr. BALDWIN: No, the part that is for the purpose of testifying. He has not given him treatment with any idea of prescribing merely for coming into court and testifying.

WITNESS: I have the patient under treatment at the present time.

Mr. BALDWIN: We also add the ground that it is too remote. [212]

(Testimony of Doctor Alred.)

The COURT: I will overrule the objection.

Mr. BALDWIN: We will note an exception. May we have a general objection and exception along this line to each question.

The COURT: Yes.

Q. Do you recall the question?

A. Yes. I examined his pulse and his blood pressure, heart rate sounds. He carries a constant high pulse rate. 99 to 100 or better. His blood pressure is from 182 to 202. His heart sounds are similar in character; shows a weak myocarditis. That means heart muscles. I should have said his reflexes are exaggerated. I mean the reflexes, such as the jaw, the muscles of the arm, the abdomen. That is the tentative reflexes which are indicative of his present nervous disturbances. Laboratory tests show the degree of his anemia. I did not make the laboratory test, I had them made. As to what else I observed in his physical examination, upon my examination, the outstanding thing besides his physical condition is the apparent mental disturbance. It is such that I classify him as a definite neurotic, which is not mild at all. As to what was apparent to me from my examination of his heart condition that I have described it was apparent that he had no reserve, that his heart is being taxed to the utmost constantly, so much so that an exertion would endanger his life. As to how severe an exertion, I will say that I would not feel that he would be able as an example, to be walking about without endanger-

(Testimony of Doctor Alred.)

ing himself. As to whether there is anything else in his condition that I have not as yet described, that I discovered he showed evidence of past care; he had a scar in his abdomen of an operation for appendicitis; and he has another scar below the right rib margin, which is operative in character, and from which I am told a tumor was removed. [213]

Mr. BALDWIN: By whom were you told that?

A. By the patient.

Mr. MOLUMBY: Q. Did you notice anything with reference to his kidneys?

A. Yes, a kidney function test, shows practically a minimum function to insure life.

Q. Will you state what your diagnosis of the plaintiff's condition is?

Mr. BALDWIN: We object to that as immaterial, what his present diagnosis shows; too remote.

The COURT: He may answer.

Mr. BALDWIN: Note an exception.

A. His diagnoses are multiple, they are as follows: anemia, nephritis, chronic; myocarditis, hypertension arterial sclerosis and psychoneurosis; atrophy of the legs from disuse; enlarged prostate. I will state what I mean by anemia, it means less than a normal amount of red blood content. By nephritis, it means an impairment of the kidneys. Myocarditis means a weak heart attack of the heart muscles. Hypertension means an increase over a normal amount of blood pressure. Arterial sclerosis means the hardening of the arteries on some part

(Testimony of Doctor Alred.)
or all parts of the body. Atrophy of the legs means that both in size and ability have shrunken, or disappeared.

Q. Doctor, defining the term total disability as follows: Total disability being any impairment of mind or body which renders it impossible for the insured to follow a substantially gainful occupation without seriously impairing his health and that total disability is to be considered as permanent when it is of such a nature as to render it reasonably certain that it will continue throughout the life time of the plaintiff, and [214] that total disability does not mean helplessness or complete disability, but includes more than that which is partial; permanent disability means that which is continuing as opposed to that which is temporary; that distinct periods of temporary disability do not constitute that which is permanent. That the mere fact that one has done some work is not of itself sufficient to defeat ones claim of permanent total disability. He may have worked when really unable, and at the risk of endangering his health or life. If one is able to follow a gainful occupation only spasmodically, with frequent interruptions due to his disability, or if the periods of work, though more or less regular and continuous were done at the risk of endangering his health or life, he was nevertheless totally and permanently disabled, but on the other hand if he was able to follow a gainful occupation regularly without frequent interruptions be-

(Testimony of Doctor Alred.)

cause of his disability then he would not be totally and permanently disabled. And taking into consideration, Doctor, the examination which you made of the plaintiff, and considering these facts to be true that Carl Noble enlisted in the United States Army on the 20th day of September, 1917, and served in the United States Army down to and including the 30th day of June, 1919, in the 60th infantry, of the 5th Div., first going to Spokane, Washington, then to Camp Gettysburg, Pa., thence to Camp Green, Charlotte, North Carolina, and while at Camp Green had the mumps, reported to the Infirmary and the Doctor ordered him back to duty, and that that same afternoon again reported to the Infirmary and was examined by two doctors who decided there was nothing wrong with him; that he then reported to the Infirmary again the next morning and he was given castor oil and marked "duty", and went back to camp and took a detail out to clean out ditches, and the next [215] morning the mumps went down on him, and he then again reported to the Infirmary, and the Doctor told him he had had the mumps but was over them; that he had a swelling in the groin and testicles and was moved to Camp Merritt while in that condition, and was there in bed for a couple of days while in quarantine, and remained in quarantine for about a week with no duties to perform, and at the end of the quarantine went to Hoboken and boarded ship for France on the 16th of April, 1919. Upon ar-

(Testimony of Doctor Alred.)

riving in France was sent up to the front with his division in the Alsace-Lorraine Sector and was 15 days under shell fire, in that sector, he being a wagoner whose duty it was to go up with the supply train from the railheads to the front line, and thereafter was 39 days under shell fire in an area south of St. Mihiel, and later was under shell fire for 10 days in the St. Mihiel, and still later 39 days under shell fire in the Meuse Argonne, and that he was gassed in the St. Mihiel offensive, vomitted and was sick to his stomach, had diarrhea, felt sick and sore in the chest for a week or ten days; then later while in the Argonne was again gassed and vomitted frequently for several days and had diarrhea which remained with him until after the Armistice was signed, and on neither of these two occasions, reported to the hospital or infirmary for treatment; that while in the Argonne near Mont Foucan a shell exploded under the wagon he was driving, tearing off a portion of the wagon, the end gate and brake; the team hitched to the wagon running away and piling up at the foot of the mountain with the plaintiff tangled up in the pile-up; that five days later had aged greatly and from then on was extremely nervous, excitable and would stutter when he talked, would wave his arms and looked wild, had starey eyes, would scream and yell at the horses and men, and even at the officers, and that [216] this condition remained with him all during the rest of his service in the army and existed at

(Testimony of Doctor Alred.)

the time of his discharge from the army and has remained at all times since then to the present date. That after this experience the plaintiff did not report to the hospital or infirmary for treatment; that after the Armistice was signed he proceeded with his regiment to Luxemburg, and while in Luxemburg had the influenza and was laid up in his billet in bed for four or five days, and when he got up was sick and was a long time getting his strength back, and thereafter and until his discharge had very little to do as far as duty was concerned until he came back to this country with his regiment and was discharged. That after his attack of flu in Luxemburg he was short of breath and got fatigued quickly and at the time of his discharge from the army was nervous, soft, couldn't stand much exertion and when exerted himself was short of breath and the veins in his neck would throb, his ears would throb and he would have palpitation, and that on the 31st day of December, 1918, the plaintiff was cited for devotion to duty during the St. Mihiel and Argonne offensives.

Mr. BALDWIN: We object to that part as immaterial.

The COURT: Yes, it is immaterial.

Mr. MOLUMBY: Disregard that statement with reference to the citation to devition to duty.

That after being discharged from the army he returned to his home in Grass Range, Montana and lived with his brother on the ranch occupied by him

(Testimony of Doctor Alred.)

prior to his entry into the army, doing no work that Fall or Summer except that he did some plowing and when plowing would find himself rigid and stiff on the plow, would then relax and before he had gone 30 rods would be in the same condition—just as tight as a fiddle string. That his work [217] would be interrupted because of sleepless nights; he would get to palpitating and the bed would seem to shake and when he didn't work he wasn't troubled much, but when he worked would be restless, his heart would pound and he could feel the bed shake, he would have nightmares and troubled dreams. Most of them were connected up with men hollering; these fellows in his dreams had liquid fire on them and were hollering and he would want to put the fire out and imagined that he had it on himself sometimes even though he had never personally encountered liquid fire while in the army, or at all. If he worked after a night of that kind it would be worse the next night; that that winter of 1919 and 1920 he did not do any work and in the spring of 1920 his brother put in the crop on his ranch and it was necessary for them to hire a fellow a few days at a time because the plaintiff was unable to go ahead with the work, but did some of the easiest jobs; that the plaintiff drove the team some and could stand it a while and then would have to quit; he would work a day at a time and then would have to quit. That that summer and fall the crop was harvested by his brother and hired help; that in

(Testimony of Doctor Alred.)

the spring of 1921, the plaintiff worked upon the seeding of 30 acres for about a day and had to quit because he was sick, and his brother and one Bert Ingram put in the crop on the place in 1921; that that summer the crop was harvested and threshed by his brother and Bert Ingram; that in summer of 1921 the summer-fallowing of about 50 acres was done by his brother and one Bert Ingram and in the spring of 1922 his brother and a hired man put in 40 or 50 acres of summer fallow and 30 acres of spring wheat, the plaintiff doing a little of the work in seeding for a day or two at a time; that since that time the plaintiff has attempted to do no work whatever and has been unable to do any work whatever; [218] that in the fall of 1919, in November, he procured a mixture of digitalis from the druggist in Grass Range and at which time he had a jumpy throbbing pulse and palpitation, a temperature of 99.6, shortness of breath, an eye stare, was nervous, fidgity, haggard and stuttered. Thereafter, and over a period of 18 months off and on he procured a similar medicine from the druggist; that in February, 1923, he was examined by Dr. Porter of Lewistown and found to be suffering from heart trouble and extreme nervousness, and was advised to go to the Government hospital. That when he first returned from the army he was weak and pale, had aged greatly while in the army; had become grey haired, was short of breath, was highly nervous, excitable, stuttered, would get incoherent

(Testimony of Doctor Alred.)
when talking and used his hands and his hands fluttered when talking; that this condition has existed ever since his discharge from the army, this condition of nervousness that I have just described has existed ever since his discharge, to the present date; that he has gradually grown a little worse; that he was in the Deaconess Hospital and operated on for appendicitis in June or July of 1922 and was in the Veterans Bureau Hospital at Fort Harrison in 1923 for about 6 weeks in the early spring, and in the following February went to the U. S. Veterans Bureau Hospital in St. Paul, known as the Aberdeen Hospital, and was in bed for a period of 13 or 14 months, and then returned to his ranch at Grass Range and was again hospitalized in 1931 in Helena for 6 or 7 weeks and again in the spring of 1932 was in the hospital at Ft. Harrison, Helena, Montana, for three weeks, and again in the spring of 1933 was hospitalized at Lewistown, for a couple of weeks, and transferred from the hospital at Lewistown to the hospital at Fort Harrison where he remained for a period of nine months, at which time he was brought [219] home on a stretcher, and has remained in bed ever since, and up to the present date. Assuming these facts to be true, Doctor, and taking into consideration what you observed of the plaintiff on your examination of him, and defining total disability, as I have heretofore in this question defined it, state whether or not the plaintiff Carl Noble was or was not in your opinion totally and permanently

(Testimony of Doctor Alred.)

disabled on the date of his discharge from the army, July 30, 1919.

Mr. BALDWIN: We object to that as incompetent, irrelevant and immaterial, and not justified by the record in this case, and as being an improper statement as to what constitutes permanent and total disability. Permanent and total disability at law, means this, and this only. Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. That the supposed definition of total and permanent disability read by Counsel into the question is used in the argument by the Supreme Court of the United States, and not from the statement of any definite rule.

On the further ground that there are included in the question matters not shown by any proof in the case, and there are omitted from the question material matters which might reasonably change the conclusion of the expert, if stated to him, which do appear from the records in this case.

The COURT: Overule the objection.

Mr. BALDWIN: I will ask an exception.

A. Taking those as facts and your definition, he was undoubtedly totally and permanently disabled at the time of discharge. He [220] was undoubtedly, totally and permanently disabled if those be true facts in following your definition.

(Testimony of Doctor Alred.)

Q. And at what time?

A. At the time of discharge.

Cross Examination by Mr. Baldwin:

Q. Well, now, if we define total and permanent diasbility as an impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful employment, which is of such a nature and character, and is founded upon condition which renders it reasonably certain that it will continue throughout the life of the person suffering it, would your opinion be different?

A. I didn't get any essential difference in your definition there that would change my opinion.

Q. Well, what is your distinction between the two definitions?

A. I didn't get any difference between yours and his.

Q. To you they mean the same? You never saw Carl Noble until a week or two ago?

A. Last Friday night is the first time I ever saw him.

Q. And you don't know on what day he was discharged from the army.

A. Only as I heard it read. I have not attempted to memorize it.

Q. That was on the 30th day of July, 1919. Could you, from your examination and the things known to you, determine what the condition of Carl Noble was on that date?

A. Not in the least.

(Testimony of Doctor Alred.)

Q. Could you determine from your examination whether he was or not able to carry on an ordinary occupation, gainful in character, on the date of his discharge from the army, July 30, 1919? [221]

A. No.

Q. Could you determine from your examination that he had any heart condition at that time?

A. No sir.

Q. Or that he had any nervous condition?

A. No sir.

Q. Could you determine from your examination in any way as to what his condition was at any time prior to, we will say, 1930?

A. No.

Q. Or 1932, as far as that is concerned?

A. No.

Q. Or 1933?

A. Yes, you would have a right to an opinion at a recent date on it. I cannot tell when any of these conditions actually existed. I have not specialized in diseases of the heart. I have not specialized in diseases of the nerves. Now, the myocarditis means that the muscles of the heart have been mildly affected.

Q. I think you said you found a mild myocarditis?

A. I didn't say mild, I said myocarditis. In that case it means simply muscles of the heart. That is the condition of the muscle itself, and not of the valves, or other portions of the heart. I could not

(Testimony of Doctor Alred.)

determine from that heart condition that the man was unable to follow a substantially gainful employment in 1930; or any year prior to that. I said I also found anemia.

Q. That simply means a weakening of the system, run down condition.

A. No, I testified that showed as a lessened blood content.

Q. To the average man it means that the system is run down?

A. The system is run down in that condition, but anemia does not mean that. [222] By his present examination you cannot tell when that anemia came into being. I spoke of chronic nephritis. That means a kidney impairment. As to what extent his kidneys were impaired at the time I examined him, they are very markedly impaired at the present. I stated that that condition was such that they were functioning merely to the point that would sustain life. I cannot tell when that condition came into existence. It may not have come into existence until 1930 as far as my observation was concerned.

Q. Doctor, I will ask you whether the heart condition that you found would reasonably follow the kidney condition, or the kidney condition resulting from the heart condition?

A. There is a distinction between the heart and kidney. The heart being the pump which furnished the power by which the kidneys do their secretion. If the kidneys fall down on their work, the heart

(Testimony of Dr. Alred.)

has that much more work to perform; which might bring about the conditions that I found. In the myocarditis.

Q. Is it reasonable to suppose that the kidney condition was the cause that superinduced the heart condition?

A. No, that is not necessarily a reasonable supposition.

Q. I didn't ask you about any supposition. I said it was reasonable to suppose?

A. No, that is not a reasonable supposition. I can't determine which condition came into being first. In my opinion I doubt whether any one else can. Hypertension means an increased blood pressure, an increase over normal. Carl's age was 46, I believe, at the time I examined him. The increased blood pressure in my opinion, resulted from his sclerosis and his nephritis, and his increased nervous tension. Sclerosis means an increase in the deposit of the lime salts in the blood vessel wall. In other words, [223] the hardening and contraction of the arteries. That hardening comes about normal as we advance in years.

Q. And at forty-six many men have that condition that you found in him, so far as the condition of the wall and blood vessels are concerned?

A. It is not an uncommon finding.

Q. So that as far as that condition was concerned, there was nothing out of the way for a man of his age?

A. Yes, he has it beyond the ordinary.

(Testimony of Doctor Alred.)

Q. That condition comes around as a reason of hard work very often at a premature time?

A. This question of hard work, it is a doubtful question, if hard work causes the hardening of the arteries.

Q. It may, may it not?

A. I don't believe there is any proof to that effect.

Q. I am asking your opinion?

A. I doubt it.

Q. Now, you found the legs atrophied. You don't know when that condition came about, do you?

A. I can say from examinations that it has been existing for some time. In my opinion for a year or more.

Q. But that would not carry it back beyond 1930?

A. I cannot say how far it might go. I can say it has existed that long.

Q. And that, in your opinion, would be the approximate time that that condition had existed?

A. No, I will state that it has existed for that length of time, or more.

Q. Give us the extreme length that you can say from your examination that condition has existed?

[224]

A. I cannot say how long it existed. It may have existed for thirty years so far as present findings are concerned. I cannot fix a definite date when it came into being. I found an enlarged prostate. I

(Testimony of Doctor Alred.)

will tell the jury what that means. The prostate is the gland that sets under the urinary bladder, connected with the sexual organs, and an enlarged condition simply means that it is larger than the normal prostate for a man of his age. I canot tell when that condition came into being.

Q. Now, Doctor, let us assume as a fact, in addition to what you have already considered in forming your opinion, that on the 28th of July, 1919, your patient Carl F. Noble, was examined for discharge from the United States Army; that at that time he was asked this question: "Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury or disease, or that you have any disability or impairment of health, whether or not incurred in the military service, to which he answered, "Yes". That he was then asked this question: If so, describe the disability, stating the nature and location of the wound, injury or disease, to which he answered "hearing". That he was asked this question immediately thereafter: "Q. When was the disability incurred?" to which he answered, "A couple of months ago." That he was then asked this question: "Where was the disability incurred?" to which he answered, "France." Whereupon he was asked this question: "State the circumstances, if known, under which the disability was incurred?" "A. Unknown." And that after giving those answers to the questions asked, Carl F. Noble stated

(Testimony of Doctor Alred.)

in writing, and over his hand or signature written by him: "I declare that the foregoing questions and my answers thereto have been read over to me, and that I have fully understood the questions, and that my replies to them are true in every [225] respect, and are correctly recorded." Mr. Molumby: Objected to on the ground that it is assuming a fact not in evidence. Mr. Baldwin: It will be in evidence. I am going to put in the war record. Mr. Molumby: I am not so sure about that. The Court: Your inquiry is whether that would make any difference in his opinion? Mr. Baldwin: Yes. The Court: Overrule the objection, providing you place that in evidence.

Q. Now, assuming those things to be facts, and true, that the only disability that was known to Carl F. Noble at the time of his discharge from the army was with reference to his hearing, and assuming that he did not know when that condition came about to be true, and assuming that he made no complaint of any nervous involvement or heart condition, or kidney ailment, or any complaint of any physical kind excepting that his hearing had been affected would that in any way alter your conclusion in this case?

A. Not if the other facts as recited were true.

Q. I know, but, considering this added fact.

A. Assuming that, it would not alter that, because patients do not know what ails them.

(Testimony of Doctor Alred.)

Q. His statement, or failure to state that he had not any heart impairment, or kidney ailment, would not in any way enter into the question?

A. No, he might not know at the present that he had any kidney ailment.

Q. Would the want of knowing that he had any kidney ailment at that time affect his ability, in your opinion, to carry on continuously a substantially gainful employment?

A. Yes.

Q. Would the presence of——

A. Would the lack of it? [226]

Q. Yes.

A. If he had kidney impairment, or lack of kidney impairment, it would not impair his earning ability?

Q. Do men have serious involvements of kidney conditions without knowing it frequently?

A. Frequently, yes. They do not have pounding of the heart without knowing it. They do not have palpitation of the heart without knowing it. If he had myocarditis he would know it.

Q. If they had a pounding of the heart and palpitation of the heart?

A. They would know that.

Q. Let us assume that at the time that he was examined on discharge in the army on July 28, 1919, that Carl F. Noble did not know that he had palpitation of the heart, or pounding of the heart,——

Mr. MOLUMBY: That is objected to on the ground that it is assuming a fact not in evidence.

(Testimony of Doctor Alred.)

Q. Let us assume that at the time he was examined on discharge in the army on July 28, 1919, that Carl F. Noble did not know that he had palpitation of the heart, or pounding of the heart, would that in any way alter your conclusion in this matter?

Mr. MOLUMBY: Just a moment.

The COURT: It seems to me that is verging on a disputed statement. In the deposition doesn't it tell about the palpitation of the heart very close to the time of his discharge, and have not the witnesses here testified to that?

Mr. BALDWIN: I am not in a position to say. That is for the Jury.

Q. Do you recall the question?

A. I believe you said assuming that he did not know that he had palpitation of the heart, would that impair his earning ability? [227]

Q. Would that alter your opinion in the case?

A. Well there is an error there, because palpitation or pounding of the heart is something that the patient recites; nobody else can determine that for him. That is a symptom which he observes; no one else, if he had it, he would know he had it. If he had that palpitation he would know he had it.

Q. And if he had that condition at that time, or rather did not have that condition at that time, it would have a material bearing on your conclusion, would it not?

A. If he did not have?

Q. If he did not know that he had a palpitation or pounding?

(Testimony of Doctor Alred.)

A. It would overrule the evidence that was stated to be in this question that he had palpitation.

Q. It would cause your opinion to be entirely different?

A. It would alter that.

Q. We will assume further in the statement of fact that I have stated to you, Doctor, that prior to his discharge from the army, and on July 28, 1919, a duly qualified and competent physician and surgeon made a complete physical examination of Carl Noble, the plaintiff in this case, and found the only condition observable by him, which might affect the health of the plaintiff here, was that his hearing was R 18-20, L 18-20, and Otitis, media, catarrhal, bylateral, maximum benefit obtained. Would that any way, taking it as a fact, that those were the only things wrong with the plaintiff here, in any way affect your conclusion?

Mr. MOLUMBY: We desire to object on the ground that it is assuming a fact not in evidence.

Mr. BALDWIN: It will be——

The COURT: He has promised to put it into evidence. I think you ought to have it in evidence. I will overrule the objection. [228]

A. If this was a complete physical examination, and made by a competent physician, many of these factors should have been found if they were present.

Q. Well, the physician certified it as a careful physical examination

A. If I may qualify that that related to his kidney condition his physical condition will not dis-

(Testimony of Doctor Alred.)

close anything there. It takes laboratory work. You have not mentioned whether his kidneys were examined in that respect.

Q. I am merely reading from the record; the items are after a careful examination of the patient, were "hearing R 18-20 L 18-20. Otitis, media, catarrhal, bylateral maximum benefit obtained. Assuming that was all that was found after a careful physical examination by a competent physician and surgeon, would that in any way be considered by you in arriving at your conclusion in this case?

A. No, because of the facts I just stated. You have disclosed nothing of laboratory findings. Blood pressure is not stated. Kidney condition is not stated.

Q. Would not the physician and surgeon's examination with reference to the heart, the condition of the nerves, and things of that kind, in making a careful physical examination?

A. He should.

Q. And if ordinarily, if he certifies that he has made a careful physical examination, it would include an examination along the lines you have indicated?

A. His present statement should include some of those facts also.

Q. We will assume that the certificate is as follows: "I certify that the soldier named above has this day been given a careful physical examination, that is, Carl F. Noble, the plaintiff in this case, has this date, the date is July 28, 1919, been given [229] a careful examination, and it is found that he is

(Testimony of Doctor Alred.)

physically and mentally sound. He is physically and mentally sound with the following exceptions: describe the nature and location of these defects: wound, injury, or disease, "hearing R 18-20 L 18-20. Otitis, media, catarrhal, bylateral. Maximum benefit obtained."

The COURT: Isn't that the third time that you have propounded that question. It seems to me that it is three times you have read that question to this witness.

Mr. BALDWIN: I read this part, the certificate was not read and was brought by his statement.

Q. When that condition was found by a competent physician and surgeon, and after a careful examination, and the defects set out were the only defects, were the results of that examination, would that affect you in arriving at a conclusion in this case?

A. If I assume that was a competent and complete examination, physical examination, I can further assume that he did not suffer any other impairment.

Q. And it would materially affect your opinion in this case?

A. If I had such information, yes.

Q. Now, hearing R 18-20 means what?

A. 20-20 would be normal 18-20 hearing, is an impairment of that fraction. R is right and L is left. That would mean a very slight impairment of hearing, 18-20.

Q. What does Otitis, media, catarrhal, bylateral mean?

(Testimony of Doctor Alred.)

A. It is an inflammation of the external ear on both sides.

Q. In other words, R 18-20 and L 18-20, Otitis, media, catarrhal, bylateral, refer to the effect of hearing caused by the conditions you have related?

A. This is a statement of his hearing ability. The other is a statement of his physical condition, in his ears, which would [230] result in the defective hearing.

Q. Let us assume, Doctor, that later on, on that day July 28, of 1919, a board of competent United States Army Physicians and Surgeons——

Mr. MOLUMBY: I cannot understand by what stretch of imagination an assumption can be made that any of this is competent.

The COURT: This record that he has got before him is probably competent and will be admitted in evidence. And he has a right to refer to that on cross examination, interrogate that witness as to whether if such and such records of examination are true, it would alter his opinion.

Mr. MOLUMBY: There is nothing to show that it is competent.

The COURT: I think it should have been introduced into evidence in the first place. Let them examine and make their objection to it before you propound any question at all. I have tried so many of these cases I was taking it for granted that it was competent and would be introduced.

Mr. BALDWIN: I wish to state in the record at this time that the papers signed by Carl F. Noble

(Testimony of Doctor Alred.)

and referred to by me on cross examination here, is marked now as Defendant's Exhibit No. 3. That the paper I read from second, being the report of the medical examiner of July 28, 1919, is marked as Defendant's Exhibit 3A; that the paper that I am reading from at the present are marked as Defendant's Exhibits 3b and 3c.

Mr. MOLUMBY: Plaintiff desires to object to the offer of Defendant's Exhibit 3 upon the ground and for the reason that the same is not properly identified; no foundation laid; nothing to prove that that is the signature of Carl F. Noble; nothing to prove that he did sign this. It is now offered after the deposition of the Plaintiff has been taken, when it should have been offered as a [231] portion of his deposition, if taken at all, when he would have an opportunity to explain the circumstances under which it was signed and plaintiff objects to the offer of Defendant's Exhibits 3a, b and c, on the ground and for the reason that no proper foundation has been laid; nothing to show who signed the various pages of those exhibits; nothing to show that they were signed by the party purporting to be signed.

The COURT: Do those exhibits purport to be signed by the plaintiff?

Mr. MOLUMBY: One of them is purported to be signed by a first lieutenant; another by a major in the medical corps.

The COURT: What about the plaintiff?

Mr. MOLUMBY: The first one, Exhibit 3, is purported to be signed by Carl F. Noble, and it is all a portion of the same exhibit, all purports to be recorded at the same time.

(Testimony of Doctor Alred.)

The COURT: Properly authenticated public document, properly authenticated by the Secretary of War?

Mr. BROWN: Yes.

The COURT: I will overrule the objection.

Mr. BALDWIN: I assume that these may be considered read, and that I may use them at any time?

Mr. MOLUMBY: Without waiving our last objection, and may an exception be noted.

The COURT: Yes.

Whereupon Defendant's Exhibit 3, and Defendant's Exhibits 3a, 3b, and 3c were received in evidence and are in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT NO. 3.

UNITED STATES OF AMERICA
WAR DEPARTMENT [232]

Washington, October 12, 1934.

I HEREBY CERTIFY that the documents hereto attached concerning Carl F. Noble, AS#, 381, 589, who enlisted September 20, 1917, was overseas April 16, 1918 to July 19, 1919; and was honorably discharged July 30, 1919, are photostatic copies of report of physical examination at enlistment and report of physical examination at discharge, the originals of which are on file in the Adjutant General's Office. I further certify that he was reported

(Testimony of Doctor Alred.)
sick, in line of duty, diagnosis not stated. February 14, April 3, May 31, June 30, and July 15, 1919.

JAMES F. McKINELY,
Major General, U. S. Army,
The Adjutant General.

I HEREBY CERTIFY that James F. McKinely, who signed the foregoing certificate, is the Adjutant General of the Army and, that to his certification as such full faith and credit are and ought to be given.

In Testimony Whereof I, George H. Dern, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 13th day of October, 1934.

[Seal] GEORGE H. DERN,
Secretary of War.
By F. M. Hoadley,
Assistant Chief Clerk. [233]

Noble	Carl F.
(surname)	(Christian name)

PHYSICAL EXAMINATION FOR ENLISTMENT

*Regular Army

Accepted—September 14, 1917, at Lewistown, Montana.

*Enlisted—Sept. 20, 1917, at FORT GEORGE WRIGHT, WASH.

INSTRUCTIONS

1. The name, date and place of acceptance, page 1, the statement of applicant, page 2, and first physical examination report, pages 2 and 3, will be filled out at the time of the applicant's examination for acceptance. The remainder of the report will be filled out at the time of his final examination preliminary to enlistment or rejection, as the case may be. The questions on page 2 will be asked before the applicant has been stripped, and any answer indicating a possible cause of rejection will be followed up by searching inquiry and examination and the result will be noted on the report.

2. The greatest care will be taken that the name of the applicant is correctly shown and that it corresponds with the name on his enlistment paper. The Christian name must not be abbreviated, but if it consists of more than one name, only the first will be written and signed in full.

3. Under the heading "Remarks" on pages 3 and 4, will be noted any authorized special assignment or waiver of defects, the nature of the authority being stated. The space under "Remarks" will also be used for continuation of an answer for which the

(Testimony of Doctor Alred.)

allotted space is insufficient and for any further statement that the examining officer may desire to make.

4. The physical examination will conform strictly to the provisions of the rules for the examination of recruits. Deviations from normal [234] though not cause for rejection, will be noted under proper headings. Syphilis, as indicated by a positive Wasserman, is not cause for rejection, if other requirements are met. Syphilitics with open lesions or mental symptoms are subjects for rejection.

5. When the applicant is enlisted, the completed physical examination report will be forwarded to The Adjutant General of the Army by the recruiting officer with his trimonthly report. When the applicant is rejected, the report will be marked "Rejected" at the top of the first page of brief, and except in case of applicants with prior military service or naval service, will be filed at place of rejection. The report in case of rejected applicant with prior service will be forwarded to The Adjutant General with the trimonthly report.

STATEMENT OF APPLICANT.

Have you found that your health and habits in any way interfere with your success in civil life? and if so, give details—No.

Have you ever since childhood wet the bed when asleep?—No.

Do you consider that you are now sound and well—Yes.

(Testimony of Doctor Alred.)

What illnesses, diseases, or accidents have you had since childhood?—None

Have you ever had any of the following: If so, give approximate dates:

Spells of unconsciousness or convulsions—No.

Gonorrhea—No.

Sore on penis—No.

Have you ever raised or spat up blood?—No.

When were you last treated by a physician, and for what ailment?—Not since childhood.

Have you ever been under treatment at a hospital or asylum, and, if so, for what ailment?—No. [235]

I certify that the foregoing questions and my answers thereto have been read over to me; that I fully understand the questions, and that my answers thereto are correctly recorded and are true in all respects.

I further certify that I have been fully informed and know that if I secure my enlistment by means of any false statement or misrepresentation I am liable to court-martial for fraudulent enlistment.

CARL F. NOBLE

(Signature of applicant)

(Testimony of Doctor Alred.)

PHYSICAL EXAMINATION AT PLACE OF ACCEPTANCE*

(Applicant stripped. See instruction 4)

Weight—137 lbs., height—67 inches.

Eyes: Vision—right eye, 20-20; left eye, 20-20.

Ears—Hearing—right ear, normal—left ear, normal.

Girth of chest (at nipples)—

At expiration, 30½ inches.

At inspiration, 34½ inches.

Flat foot.

I certify that I have personally examined the applicant, and that, to the best of my knowledge and belief, he fulfills the physical and legal requirements for enlistment.

J. W. KELM, JR.,
Captain U. S. Army, R. O. T. C.
Recruiting Officer.

Lewistown, Montana,
(Place)
September 14, 1917.
(Date)

If the applicant is enlisted at place of acceptance, this report will not be filled out, except where examination at place of en- [236] listment is made by a civilian physician.

(Testimony of Doctor Alred.)

PHYSICAL EXAMINATION AT PLACE OF ENLISTMENT

(Applicant stripped. See instruction 4)

Weight—135 lbs; height—66½ inches.

Girth of chest (at nipples):

At expiration, 31 inches.

At inspiration, 35 inches.

General examination (head, chest, abdomen, extremities)—normal.

Nose and throat—normal.

Genito-urinary organs (urine will be examined in suspicious cases)—normal.

Hernia—No.

Flat foot or other deformities of feet—

Wasserman reaction (Regular Army only).

Eyes: Vision—right eye, 20-20; left eye, 20-20.

Ears: Hearing—right ear, normal; left ear, normal.

Teeth: Right— Left—

Missing teeth—No.

I certify that I have carefully examined the applicant, and have correctly recorded the results of the examination, and that, to the best of my ability, judgment and belief, he has no mental or physical defect disqualifying him from service in the United States Army.

W. E. ROBERTS,
Medical Corps.

1st Lieut. M. R. C.
FORT GEORGE WRIGHT, WASH.
Sept. 20, 1917.

(Testimony of Doctor Alred.)

REPORT OF PHYSICAL EXAMINATION OF ENLISTED MEN PRIOR TO SEPARATION FROM SERVICE IN THE UNITED STATES ARMY. [237]

Noble—Carl F. * * * 23815 8c
Cpl. Casual Co. No. 6
(grade) (Company and regiment)
rancher
(occupation prior to entry into service)

DECLARATION OF SOLDIER.

Question: Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of health, whether or not incurred in the military service?

Answer: Yes.

Q. If so, describe the disability, stating the nature and location of the wound, injury, or disease.

A. Hearing.

Q. When was the disability incurred?

A. Couple months ago.

Q. Where was the disability incurred?

A. France.

Q. State the circumstances, if known, under which the disability was incurred.

A. Unknown.

I declare that the foregoing questions and my answers thereto have been read over to me, and that

(Testimony of Doctor Alred.)

I fully understand the questions, and that my replies to them are true in every respect and are correctly recorded.

CARL F. NOBLE,
(Signature of soldier)

Witness:

GEORGE M. DUNFORD,
(Signature of witnessing officer)

George M. Dunford, 1st Lt. Inf.,
Fort D. A. Russell, Wyo. [238]

CERTIFICATE OF EXAMINING SURGEON.

I CERTIFY THAT:

The soldier named above has this day been given a careful physical examination and it is found that

*He is physically and mentally sound.

*He is physically and mentally sound with the following exceptions:

(Describe the nature and location of the defect, wound, injury, or disease)

Hearing R 18-20; L 18-20.

Otitis, media, catarrhal bilateral, maximum benefit obtained.

In view of occupation he is—no—per cent disabled.

Remarks:

J. E. McKILLOP,
M. C.; U. S. Army.
Major M. C., U. S. A.

(Testimony of Doctor Alred.)

Place—Fort D. A. Russell, Wyo.,

Date—July 28, 1919.

*Strike out the part of the certificate not applicable to the case.

*Strike out words not applicable.

(Endorsed on back Defendant's Exhibit 3B) [239]

CERTIFICATE OF IMMEDIATE COMMANDING OFFICER.

I certify that:

Aside from his own statement I do not know, nor have I any reason to believe, that the soldier who made and signed the foregoing declaration has a wound, injury, or disease at the present time, whether or not incurred in the military service of the United States.

GEORGE W. DUNFORD,

1st Lt. Inf. Casual Co. No. 6.

Place—Fort D. A. Russell, Wyo., 7-28-1919.

*Strike the part of the certificate not applicable to the case.

*Strike out words not applicable.

(Endorsed on back 3a) [240]

REPORT OF BOARD OF REVIEW.

(See Instruction 2)

From a careful consideration of the case and a critical examination of the soldier,

We Find:

That he is physically and mentally sound, with the following exceptions:

(Testimony of Doctor Alred.)

(Describe the nature and location of the defect, wound, injury, or disease)

Otitis, media, catarrhal bilateral, right 18-20; left 18-20; hearing, defective pass—few months soldiers statement.

Maximum improvement attained.

The wound, injury or disease (is not) likely to result in death or disability.

In our opinion the wound, injury, or disease (did) originate in the line of duty in the service of the United States.

In view of occupation, he is no per cent disabled.

WM. J. CERCE,
Major M. C.; U. S. Army.
RUSS. S. CARTER,
Captain M. C.; U. S. Army.

Place—Fort D. A. Russell.
Date—July 28, 1919.

*Strike out the part of this certificate not applicable to the case.

*Strike out words not applicable.

(Instructions)

1. This report will be made out for each soldier, immediately preceding separation from the service in the United States Army.

2. If the declaration of the soldier and the certificate of the examining surgeons do not agree, the case will be referred to a board of review, to consist of not less than two medical officers convened by the

(Testimony of Doctor Alred.)

camp, post, or regimental commander, which will complete the report of this form. [241]

3. When completed the report will be forwarded, with the service record of the soldier, to the Adjutant General of the Army in compliance with instructions prescribed in orders and regulations.

(Endorsed on back 3c). [242]

Q. Let us assume, Doctor, that later on, on that day, July 28, 1919, a board of competent United States Army Physicians and Surgeons made a careful physical examination of Carl F. Noble, the Plaintiff in this case, and certified that the soldier named, the plaintiff here, has this date been given a careful physical examination, and it is found that, he is physically and mentally sound; he is physically and mentally sound with the following exceptions, describe the nature and location of the defect, wound, injury, or disease. Hearing R 18-20; L 18-20. Otitis, media, catarrhal, bilateral maximum benefit obtained." And that that was all they found with reference to the physical condition of this plaintiff at that time. Would that, taken as true, affect your conclusion in this case?

Mr. MOLUMBY: Objected to on the ground that it is repetition. The question having been previously answered.

The COURT: Haven't you put this one before?

Mr. BALDWIN: Not with reference to the examining board.

(Testimony of Doctor Alred.)

The COURT: I will overrule the objection, it sounds very familiar to me though.

A. That would not alter my opinion. I must qualify that statement because to so state alone is not sufficient. Many of these defects which he now has could have been overlooked by a competent board or competent physician.

Q. Assuming that those were the only things that he was suffering from at the time of his examination, it would alter your opinion.

A. If those were the only things.

Q. Do you think you overlooked any thing on your examination of Mr. Noble?

A. I probably did.

Q. For instance, what? [243]

A. I overlooked reciting many things that I see here. That was not the examination.

Q. Assuming that these were the conditions as they existed at that time, would it materially affect your opinion?

A. If those were the conditions it would not affect my opinion. If those were true findings it would affect my view. I can explain that to you if you so wish.

Q. Yes ahead.

A. I was going to state that if you bring in what the attorney brought out as to the nervous condition, mental and nervous condition in your question, and a cursory examination of a patient would not a board, or physician testify as to a mental and nervous condition at first examination?

(Testimony of Doctor Alred.)

Q. Now, Doctor, we will assume that the man Noble, was suffering from mild myocarditis. Would that alone render it possible for him to follow continuously a substantially gainful employment, and would leave one reasonably to believe that it was reasonably certain that it would continue throughout his life to be wholly unable to follow continuously any substantially gainful employment.

A. That is a matter of degree, to take mild myocarditis alone, if it was mild myocarditis he might follow a gainful occupation; if it was gross or marked he certainly could not follow continuously—

Q. There are many gainful occupations that would not require any physical exertion, or practically none?

A. Physical exertion, sure.

Q. Can you tell what the condition of Carl Noble's heart with reference to mild myocarditis was at any time prior to 1930?

A. By my present examination?

Q. Yes.

A. No sir. [244]

Q. Or by anything else known to you except by his statment?

A. Except by the statement, which I was told to assume as facts.

Q. Does myocarditis result from shock or fright?

A. Indirectly.

Q. Myocarditis is merely a disease of the muscles of the heart or weakening of the heart?

(Testimony of Doctor Alred.)

A. Yes sir.

Q. And how long would it take for the result to show, a myocarditis resulting from shock of the heart?

A. It is indefinite. It is a matter of defect accruing, or increasing until it became visible or apparent. Fright or shock being sufficient, it might show up immediately. In my opinion myocarditis may result from shock or freight, diseases of the heart that may result from those two conditions, shock or fright, may be of an entirely different character from myocarditis. That is the reason I stated that myocarditis would result indirectly. It would not be a direct result of fright or shock. As to what would be the involvement of the heart that might reasonably result from either shock or fright, I will say the palpitation, pounding, rapidity, regularity or irregularity might result from shock or fright, the nerve disturbances.

Q. And a man having those conditions would naturally know that he had them?

A. He would become aware of them, if he was mentally capable to recognize the symptoms. If his heart was pounding he ought to know that. That is what he means by heart pounding. That condition comes about when a man walks rapidly or up a hill. Palpitation is the same thing, it is a rapid heart beat.

Q. What does the stuttering indicate? a heart condition or a [245] myocarditis involvement?

(Testimony of Doctor Alred.)

A. A myocarditis involvement. I say that Noble at the present time has no appetite. That did not have any bearing upon my examination. I stated he had no appetite because I was asked what his symptoms were and what he was suffering from. It is a symptom of his present condition, but not of past condition, and it really has no bearing on the result I reached.

Q. Now, we will assume that after he left the army, and for a number of years thereafter, say five or six, up to 1930, that Carl F. Noble was a well nourished man. Would that have any bearing upon your conclusion in this case?

Mr. MOLUMBY: That is an assumption of fact not in evidence, your honor. We object to it on that ground.

The COURT: I don't recall whether it is in evidence or not.

Mr. BALDWIN: We will connect it up by competent proof, by depositions, if we can.

Mr. MOLUMBY: It is an assumption.

The COURT: I think you better eliminate it until you get the deposition. I will sustain the objection.

Mr. BALDWIN: And may it be understood that we may recall the witness for further cross examination when the deposition is here.

The COURT: Yes, on that proposition.

Redirect Examination by Mr. Molumby:

Q. In the question propounded to you concerning the exhibit, 3, 3a, 3b, and 3c, defendant's ex-

(Testimony of Doctor Alred.)

hibits of those numbers, counsel stated in question that if you were to assume that competent doctors did the things recounted in his question, had you any information other than what he stated to you as to their competency? [246]

A. No sir. I never heard of men that signed these exhibits. In fact I don't know who did sign them. He did not state that in his question. The answers I gave were based upon the fact that they were competent. They were based on the assumption that they were competent.

Mr. MOLUMBY: That is all.

Mr. BALDWIN: There is a question or two that I should have asked on cross examination, that I would like to ask now. A point I overlooked.

The COURT: Very well.

Recross Examination by Mr. Baldwin:

Digitalis is a medicine we use in treating the heart. As to whether it is a powerful heart stimulant, we don't rate it as a powerful heart stimulant. It is a medicine which controls the rhythm and rate of the heart.

Q. Now, we will assume that for a period of eighteen months after his discharge from the army, the plaintiff here, Carl F. Noble, used digitalis under the prescription of a pharmacist, and not after examination nor by direction nor under the authority of any licensed physician, considering that to be true, would it in anyway affect your conclusion in this case?

(Testimony of Doctor Alred.)

A. No sir.

Q. The use of digitalis for a period of eighteen months would not have any effect upon the heart action, or heart muscles?

A. Yes, it would have a marked effect upon the heart muscles. As to what that effect would be, it would have a tendency all during the period that he was taking digitalis, it would affect the rate, slowing it to a variable degree, depending upon the amount he took, and also the quality of the digitalis. The constant use of digitalis over that period of time would naturally have [247] an effect upon the heart and muscles if it was given in therapeutic or toxic doses. Therapeutic dose would be sufficient amount to cause a medical effect; a toxic dose would be a poisonous dose. The effect of any dose would be if continued over a period of eighteen months. A physician before prescribing that remedy would have to know the entire physical condition of his patient, at least he should. The giving of, or the use of digitalis might be a very effective agent in bringing about a heart condition.

Q. Now, Doctor, in view of those facts, would not the fact that Noble used digitalis without examination by a physician, and not under the direction of one licensed to practice medicine, use digitalis over a period of eighteen months, would not that have some bearing on the man's condition and your conclusion in this case?

A. You asked me if it would bring about heart effects, and I answered yes. It would not bring

(Testimony of Doctor Alred.)

about the effect in which I found his heart. As to what effect it would bring about, digitalis continued over a long period of time is capable of creating a heart flow, causing the heart to lose its regularity, and miss or drop beats. When it loses or drops beats, that is the nerve control of the heart. The heart is controlled by special nerves. As a matter of fact it has a special nerve center all its own, that controls its action independent of the other organs. Digitalis would have an effect upon the nerve control. The nerve control regulates the heart beat. As to whether digitalis might effect the heart control so that it might pick up a beat or drop a beat, I will say his heart is not skipping a heart beat. Using digitalis is not like laying a whip on the back of a tired horse, there is no resemblance between the two. Digitalis slows the heart down. [248]

Q. And the slowing down of the heart by the use of digitalis for a period of eighteen months, you think would have no effect upon the condition of the man?

A. Yes, it might have.

Q. Well, it could have, but you say in this case it didn't have?

A. No, I couldn't say that.

Q. Assuming then that it did cause, or that he took this digitalis over the period specified, eighteen months, it might have a bearing on your conclusion, would it not?

(Testimony of Doctor Alred.)

Mr. MOLUMBY: I object to that as repetition.

The COURT: He has already answered you once or twice.

Mr. BALDWIN: Note an exception.

WITNESS continuing: A man having the heart involvement that I say I found, would be in need of medical attention.

Q. Would not the fact that between July 30, 1919, when the plaintiff was discharged from the army, and the year 1923, he sought no medical advice and received no medical attention, have a bearing on his condition as you found it?

A. Well, it is in keeping with what I know about this case. It proves to me that at least he labored under the belief that he did have a heart ailment.

Q. Well, I am not dealing with your belief, I am dealing with your opinion on the facts found, and assuming the added fact that from the time he left the army until 1923, the plaintiff here sought no medical treatment.

Mr. MOLUMBY: We object to that, as not in evidence. The evidence was that he did take medicine, and that was given him in the hypothetical question stated to him.

Q. And assuming that there was a doctor available, wouldn't that in some way cause you to revise your conclusion as to what his [249] condition was during that period?

(Testimony of Doctor Alred.)

A. That was read to me. I knew that he had taken digitalis, and that he went through this period with a pharmacist prescribing some medicine. I was not aware that he had not sought medical advice from July 1919 to the year 1922?

Q. Wouldn't that indicate to you that the man's condition was not so serious that he could not carry on any substantially gainful employment?

A. No, that would not alter that, he was not occupied in a gainful occupation.

Q. It is not a question whether he was, the question that is presented here in my question is, wouldn't it affect your opinion as to his ability and power to carry on?

A. No, many people do not seek medical attention at all. The fluttering of the hands indicated a nervous condition.

Q. And can you tell what the condition of that nervous involvement was at the time stated, between July, 1919, and the year 1922?

A. No, not from my medical examination.

Q. If it was merely as marked as you found it, it would require medical corrections, would it not?

A. It would need medical attention.

Q. And these other conditions, if they existed in 1922, would be the same, would not they? They would require medical attention and correction?

A. They would need medical attention.

Q. And if that condition existed in 1922, by proper medical advice the condition might be remedied, might it not?

(Testimony of Doctor Alred.)

A. It could have been helped, I would assume.

Q. And if helped it might result in the plaintiff here being able to carry on a gainful employment, might it not? [250]

Mr. MOLUMBY: Objected to on the ground that it is purely speculative.

The COURT: Yes, I think so. Sustain the objection.

Q. What was there in the heart condition that prevented Mr. Noble from carrying on a gainful employment in 1922?

A. I stated about his heart involvement, palpitation, and pounding.

Q. That is what he told you?

A. That is what I was told in this statement.

Q. I am asking you from your observation, what conditions you found, from what you learned yourself?

The COURT: He has already said that he cannot go back of 1930. Why ask him that?

Witness excused.

PLAINTIFF RESTS.

Mr. BALDWIN: Defendant now moves that the case be dismissed on the following ground:

That the Government cannot, without its consent, be sued, and it has not consented to be sued in this action. That the court has no jurisdiction

of the person of the defendant. That the court has no jurisdiction of the subject of the action. That the complaint fails to state facts sufficient to constitute a cause of action. That it appears definitely from the complaint that no denial of any claim made by the plaintiff has ever been appealed to or decided by the administrator of the Veterans Administration; that it appears definitely from the proof of the plaintiff, made by the deposition of Carl F. Noble, the plaintiff here if it be credited, that the only decision upon which he bases his claim of right to sue is based upon an apparent judgment by the insurance claim counsel. That as a result of his [251] advice, failed to carry his claim to a conclusion, and to avail himself of all remedies within the Veterans Administration. He has failed to place himself in a position where he has a right to sue the Government, or maintain an action in this court.

On the further ground that it appears definitely from the proof put in by plaintiff, that there is a material variance between the claim on which he bases his right to sue here, and to recovery, if recovery be allowed, and the claim as stated in this complaint in this action.

Defendant now moves that the court direct a verdict for the defendant in this case on the grounds stated in its motion that the action be dismissed, and on the added ground that by its complaint, or by his complaint, the plaintiff has limited himself to a specified day, July 30, 1919, the date of his

discharge from the army, and his claim for disability, as proven by him, relates to a later date.

The COURT: Overruled.

Mr. BALDWIN: We will ask an exception.

The COURT: Is there any variance in the proof, and your allegation?

Mr. MOLUMBY: In this respect only. The allegation of the complaint is that the director of the Veterans Bureau, and the Bureau of War Risk Insurance, by recent Act of Congress has changed their name, and call it The Veterans Administration.

The COURT: Isn't that the way it was when the complaint was filed?

Mr. BALDWIN: Yes.

Mr. MOLUMBY: I think they changed the name prior to the filing of this complaint. I would ask leave to amend the allegation of the complaint, to add, on page 3, line 1, after the words "Bureau of War Risk Insurance" the following words, "And the Veterans [252] Administration." In line 6 before the words, or the word "Insurance" by adding the words "And Veterans Administration", and after the word "Directors" add the words "And Administrators". I would ask leave to amend that.

The COURT: I will allow the amendment. Call in the Jury.

Mr. BALDWIN: Note an exception.

DEFENDANT'S CASE

Whereupon Mr. Brown made opening statement to the Jury.

Mr. MOLUMBY: We ask that the record show, that the deposition which is about to be presented

by Counsel has been opened prior to this session of court, and prior to the beginning of the hearing of this case, and is now open.

The COURT: What are the circumstances?

Mr. MOLUMBY: There was no Counsel present representing the Defendant.

Mr. BROWN: I noticed that it was served. They didn't see fit to be present at that hearing. The United States was represented by a Deputy United States Attorney.

The COURT: Where was it taken?

Mr. BROWN: It was taken in Portland, Oregon, and it was then, as I understand it, sent by the Notary Public, who took it, and mailed to the Clerk of the Court.

Clerk of the Court WALKER: No.

The COURT: We will have to conduct some inquiry, how it got here, and how it happened to be opened, and who opened it.

Mr. BROWN: Are you sure that it was not sent to the Clerk of the Court?

Clerk of the Court WALKER: It was sent here by The United States Attorney. We have the envelope that it came in.

Mr. BROWN: Was the envelope sealed [253] or unsealed?

Clerk of the Court WALKER: This envelope was sealed. That was in it. We have nothing to show from the envelope that it was a deposition.

The COURT: I know what the law is, on the subject. The United States Attorney, or Deputy,

representing the Government at the taking of this deposition, had no right to take the deposition and mail it to anbody.

Mr. BROWN: I don't know that he did.

The COURT: If it was mailed by the officer who took the deposition, it should have been noted on the outside of the envelope, what it was, so that the Clerk would know, and not open it by mistake. I don't understand how it got away from the Notary Public or the Officer taking the deposition, how it happened that he did not take care of it himself. You can look into the water, and we will take it up at one thirty p. m.

Whereupon the hearing was continued until one thirty o'clock P. M., Thursday, October 31, 1924.

Thursday afternoon, October 31, 1924.

Whereupon

J. H. BALDWIN,

a witness called and sworn on behalf of the Defendant, testified as follows:

Direct Examination by Mr. Brown:

My name is James H. Baldwin. I reside in Butte, Montana. My profession is that of an Attorney at Law. I am at present the United States Attorney for the district of Montana. I was appointed January 2 this year, first without the confirmation of the Senate and later by Senatorial confirmation. At the time that I took over that office, there was a cause pending in this court, No. 895, Carl F. Noble, Plain-

(Testimony of J. H. Baldwin.)

tiff, vs. United States of America. After I took over the office, and prior to this term of Court, [254] I did work on the preparation of that case for trial, to the best of my ability.

Q. And in the course of that preparation for trial, what have you to say as to whether or not you believed, in your judgment, it was necessary that the deposition of Dr. Smith, who was not residing in the State of Montana, be taken?

A. I did after conference with Francis J. McGan, the attorney in charge of these particular cases. Steps were then taken to take the deposition of Dr. Smith.

Mr. BROWN: I will ask that this deposition be marked for identification purposes as Defendant's Exhibit 4.

Whereupon deposition was marked Defendant's Exhibit 4.

WITNESS continuing: Having been handed the paper marked Defendant's Exhibit 4, the names appended thereto are: James H. Baldwin, I signed my signature; Mr. Francis J. McGan, signed his in my presence.

Q. Subsequently then there was the statutory notice of the time and place of taking the deposition, with the name of the witness whose deposition was to be taken?

A. Yes, that was the notice we gave of the taking of the deposition of Dr. Smith, I believe, this year. Also the time and place that that deposition would

(Testimony of J. H. Baldwin.)

be taken. I also sent attached to it an affidavit of service on the attorneys for the Plaintiff, Messrs. Molumby, Busha & Greenan.

Q. And thereafter, and after the date of this notice, which was dated at Butte, Montana, on the 21st day of September, 1934, Mr. Baldwin, what occurred after that. Did you have anything to do after that with the taking of the deposition?

A. Not with the taking. It was referred to Mr. Meindl, I believe, the Attorney for the Department of Justice, at the place of the [255] taking of the deposition, which I believe was Portland. He handled the taking of the deposition himself on behalf of the United States at the request of Mr. McGan and myself.

Q. I will ask you whether or not in this case, and in all cases it is the practice of the United States Attorney, required by the rules of the Attorney General, that office files be kept of all these cases.

A. That is the rule and we obey it as fully as we can. I kept an office file in this Noble case, in conjunction with the other people in my office, the clerks and the assistants in my office. I have that office file with me.

Q. And is there anything in that office file that you had with you by which you can tell whether or not this deposition that I have had marked Defendant's Exhibit No. 4, came into the United States Attorney's office at Butte?

(Testimony of J. H. Baldwin.)

A. I have a letter that indicates it. Having been handed Defendant's Exhibit No. 5, that is the letter that I referred to as indicating that it did come into my office. That is the letter I received addressed to the United States Attorney, Federal Building, Butte, Montana. As to whether I have any other letter in the file that indicates other than this one, that the deposition did come into my office, I have a letter that I sent to Mr. Dill in response to that letter. That is a carbon copy made at the same time as the original. That document that I have just referred to has been marked Defendant's Exhibit No. 6. The carbon copy, and identical with the original, except on the original my name was written in, James H. Baldwin, not appearing upon the copy. That is the only correspondence that leads me to believe that this came into my office. That is the only correspondence that I have, excepting a letter from Mr. Meindl [256] in which he states "I understand that the Notary Public is mailing the original in the above case to the Clerk of the Court at Great Falls, and will mail the original in the other case tomorrow.

Mr. BROWN: We offer Defendant's Exhibit No. 5 in evidence.

Mr. MOLUMBY: No objection.

Whereupon Defendant's Exhibit No. 5 was received in evidence without objection, and is in words and figures as follows, to-wit:

(Testimony of J. H. Baldwin.)

DEFENDANT'S EXHIBIT NO. 5.

STATE BANK OF MORTON

Morton, Washington.

October 8, 1934.

United States Attorney,
Federal Building,
Butte, Montana.

Dear Sir:

Enclosed you will find original deposition in the case of Carl F. Noble vs. United States. #895—Great Falls Division.

Kindly forward witness fee form and also voucher for myself.

Very truly yours,
ROSS DILL.
Ross Dill

Filed Nov. 1, 1934.

GARLOW, Clerk.
C. G. Kegel,
Deputy Officer.

Mr. MOLUMBY: No objection to Defendant's Exhibit No. 6.

Mr. BROWN: Exhibit No. 6 is dated Butte, Montana, October 11, 1934.

Whereupon Defendant's Exhibit 6 was received in evidence, without objection, and is in words and figures as follows, to-wit:

(Testimony of J. H. Baldwin.)

DEFENDANT'S EXHIBIT NO. 6.

Butte, Montana,
October 11, 1934.

Ross Dill,
c/o State Bank of Morton [257]
Morton, Washington

Re: Great Falls, Montana Division
Civil cause No. 895;
Carl F. Noble v. U. S.

Dear Sir:

This will acknowledge receipt of your letter of October 8, 1934, with enclosures, all relating to the above-entitled matter.

These papers have been referred to Mr. Francis J. McGan, Attorney, Department of Justice, Federal Building, Butte, Montana, for attention.

Very truly yours,
JAMES H. BALDWIN
United States Attorney for the
District of Montana.

JHB*MP
cc-McGan (Enc)
Filed Nov. 1-1934-Garlow, Clerk.
By C. G. Kegel-Deputy Officer.

(Testimony of J. H. Baldwin.)

Mr. BROWN: And the stenographer's notation on there that enclosure had been made.

Q. After this deposition was received in The United States Attorney's office, do you know what then was done with it?

A. Well, the letter indicates that it was referred to Mr. McGan and I believe, I am not positive of that, that I handed it to him personally. I will say in that connection that there is nothing in the file that shows a transmission of a letter to Mr. McGan, but under the office practice a copy of every letter that I send out, or anyone in my office, also the original of every letter is supposed to be in this file. I noticed that that letter is dated October 11, this year, and if the matter had been mailed to Mr. McGan there would not be in this file a copy of the letter of [258] transmission. I do not find such a letter in the files. The practice in the office is this, when letters are dictated, the copy goes to what we call the filing basket, and under the rules of the office they must be cleared at least every other day under every condition. We left for Great Falls on October 15th. I believe that Court opened on the 16th, did it not?

Q. Yes.

A. We left at eight o'clock in the morning on the 15th for Great Falls, but I think it is fair to assume that if I had sent a letter to Mr. McGan it would be in this file.

(Testimony of J. H. Baldwin.)

Q. Now, Mr. Baldwin, if that deposition was mailed, so far as you know, out of the United States Attorney's office to Great Falls, or as far as you know was it mailed out of the United States Attorneys office in exactly the same condition as it was when it came into the office?

A. It certainly would not have been changed in our office.

Q. At Mr. Molumby's suggestion I will put this further question. You were present in Court this morning when the deposition was produced by the Clerk of the Court?

A. I was, yes.

Q. So that as far as you know, it was mailed out of the United States Attorney's office and got into the hands of the Clerk in some fashion.

A. I cannot swear that it was mailed out of my office; it must have been mailed either out of my office or Mr. McGans. When the deposition was wanted for use I requested Mr. Harry H. Walker, then the Clerk in attendance upon the court here, to give me the deposition of the Dr. mentioned in it. He handed me the deposition on which appears a filing mark here October 11, 1934. It is the deposition referred to. It was not enclosed in an envelope, [259] but was in the condition that it appears now.

Mr. MOLUMBY: No cross examination.

Witness Excused.

Whereupon

CONRAD G. KEGEL,

a witness called and sworn on behalf of the Defendant, testified as follows:

Direct Examination by Mr. Baldwin:

My name is Conrad G. Kegel. I live in Great Falls, Montana. I am more than twenty-one years of age. I occupy the official position of Deputy Clerk of the United States Court at Great Falls, Montana. I have held that position all this year. Having had my attention called to a paper marked in this case as Defendant's Exhibit 4, and bearing file mark, filed October 11, 1934, C. R. Garlow, by myself, I will say that I have seen that paper before. The circumstances under which I saw it, this Document was received by me as Deputy Clerk on October 11, 1934, through the mail from Butte, Montana. I received it in Great Falls, Montana. I think the envelope in which it was enclosed is in the file there.

Mr. BALDWIN: I will ask that it be marked as Defendant's Exhibit No. 7.

Whereupon said paper was marked Defendant's Exhibit No. 7.

WITNESS continuing: Having had my attention called to a paper marked here as Defendant's Exhibit No. 7, being an envelope, that is the envelope in which I received it.

Q. At the time you received it, did you make any note upon it, or attach a note to it?

(Testimony of Conrad G. Kegel.)

A. I didn't exactly attach this note to it at the time that I received it.

Q. Well, did you make a note for reference?

A. I made a note for reference. The note is my handwriting made at that time. I recall the circumstances without referring to [260] the note. On the morning of October 11, 1934, I called for the mail; brought it up to the office, and included in that mail was this envelope, containing this deposition. Of course, I did not know that it contained a deposition at the time. It looked like ordinary mail. I opened it up and found this deposition in it, so that I made this notation on it.

Mr. MOLUMBY: No cross examination.

Mr. BALDWIN: We now offer the Exhibit in evidence, the envelope itself. It has a paper attached that we are not offering.

Mr. MOLUMBY: We have no objection to the envelope.

The COURT: It may be received in evidence.

Whereupon Defendant's Exhibit No. 7, was received in evidence without objection, and is in words and figures as follows to-wit:

(Testimony of Conrad G. Kegel.)

DEFENDANT'S EXHIBIT No. 7

(Stamp)—Butte, Oct. 9-1934.
Department of Justice.
Official Business

District of Montana
Office of, United
States Attorney,
Butte, Montana.

C. G. Kegel
Deputy Clerk
U. S. District Court
Great Falls, Montana.

Filed, Nov. 1-1934. C. R. Garlow-Clerk
By C. G. Kegel-Deputy Clerk.

This deposition received from U. S. Attorney's office on Oct. 11-1934, regular mail.

Envelope not marked on outside, and therefore opened as regular mail.

C. G. Kegel

#895. [261]

Witness Excused.

Whereupon

J. H. BALDWIN

was recalled as a witness on behalf of the Defendant, and testified as follows:

Direct Examination by Mr. Brown:

Q. Mr. Baldwin, I will ask when the deposition was sent to your office if you recall whether or not

(Testimony of J. H. Baldwin.)

there were any markings on the envelope to distinguish the character of the instrument that was inside of it?

A. There were not. If I had known it was a deposition I never would have opened it. It was merely addressed to the United States Attorney, Butte Montana, and I opened it. It came in the ordinary business envelope with other mail, in the usual course of mail with nothing to indicate what the content was. I opened it as part of the ordinary course of opening mail that morning, just as I would any other mail.

Witness Excused.

Whereupon

LOY J. MOLUMBY,

a witness called and sworn on behalf of the Defendant, testified as follows:

Direct Examination by Mr. Baldwin:

My name is Loy J. Molumby, I am an attorney duly licensed to practice. I have practiced in all of the courts of the State of Montana, and the Federal Courts in this State since 1915, but I don't recall the exact date. I have at all times during the pendency of the case now on trial been one of the attorneys for the Plaintiff therein. As such attorney I saw the deposition that is marked in this case as

(Testimony of Loy J. Molumby.)

Defendant's Exhibit No. 4 before today. I am not sure when I first did see that deposition, it was before the case started however, and I knew that it was then out of any envelope. I did not read it entirely, I glanced at it. I did not call it to the attention of the United States [262] Attorney's office, yourself, Mr. Brown or Mr. McGan, at any time. I was not taken by surprise when I discovered this morning when you wished to use that paper that it had not been transmitted according to the strict laws, or rules of law.

Q. And you had knowledge of that fact prior to the commencement of the trial of this case?

A. I acquired the knowledge either the morning that this case started, or the morning one of the other cases we have just tried started. I don't remember which it was.

Q. Can you suggest any reason at this time why the rights of your client would be prejudiced by the use of that deposition?

A. Yes.

Q. Because of any defect in transmission?

A. Yes, there are a good many reasons.

Q. What are they?

A. The man was not present, nor had any representative at the time that the deposition was taken. He has no knowledge that it is in the same condition it was in when it was taken. The further disadvantage he is placed at, it gives the opposition an opportunity to go over the deposition if it is opened.

(Testimony of Loy J. Molumby.)

Q. You had that same opportunity, didn't you?

A. No sir, it is not my deposition.

Q. Well, a deposition is taken for use by either party.

A. If it was going to be used by us, was taken by us for our purposes, we would have been there to represent him, if possible.

Witness Excused.

Mr. BALDWIN: We admit that the strict letter of the law has not been complied with. It is only the question of whether it is in conformity with section 9,191 of our Montana codes which control here. [263]

Mr. MOLUMBY: I will state that the notice served upon Counsel specifically recites that the examination of said witness will be had, and said deposition taken under and in accordance with the provisions of Sections 639, 640, 641, Title 28, U. S. C. A. That is the section of our code which provides that it must be delivered in open court and opened there.

The COURT: I will have to sustain the objection.

Defendant's Exhibit No. 4, to which objection was sustained, is in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT NO. 4.

[Title of Court and Cause.]

NOTICE OF TAKING DEPOSITION UNDER THE STATUTE.

TO: Carl F. Noble, Plaintiff above named, and to Molumby, Busha & Greenan, Great Falls, Montana, Attorneys for said Plaintiff:

YOU WILL PLEASE TAKE NOTICE, that the deposition of Dr. Robert P. Smith, Medical and Dental Building, Portland, Oregon, a witness on behalf of the Defendant in the above-entitled cause, to be used upon the trial thereof, will be taken before Kenneth Frazer, U. S. Court House, Portland, Oregon, a notary public, or any notary public, in and for the County of Multnomah, State of Oregon, at his office at the U. S. Court House, in the City of Portland, County of Multnomah, State of Oregon, who is not, and never has been, of counsel or attorney to either of the parties to said action nor interested in the event of said cause, [264] on the 8th day of October A. D., 1934, between the hours of 10:00 o'clock A. M., and 4:00 o'clock P. M., of that day, commencing at 10:00 o'clock A. M., and if not completed on that day, the taking thereof will be continued from day to day successively thereafter and over holidays at the place so indicated until completed.

The reason for taking said deposition is that said witness is a material witness for the Defendant and that said witness resides in the City of Portland, State of Oregon, more than one hundred miles from

the place where the above-entitled cause is to be tried, to-wit: Great Falls, Cascade County, Montana.

The examination of said witness will be had and said deposition taken under and in accordance with the provisions of Sections 639, 640, and 641, Title 28, U. S. C. A.

Dated at Butte, Montana, this 21 day of September, 1934.

JAMES H. BALDWIN,
United States Attorney,
District of Montana.
FRANCIS J. McGAN,
Attorney,
Department of Justice.

[Title of Court and Cause.]

Audrey Varcoe, being first duly sworn on oath deposes and says: that she, a citizen of the United States and a resident of the State of Montana, and is over the age of eighteen years, and not a party to or interested in the above-entitled action; that [265] she served a copy of the NOTICE OF TAKING DEPOSITION UNDER THE STATUTE— in the above-entitled cause on Carl F. Noble, through his Attorneys, Molumby, Busha & Greenan, Great Falls, Montana, Plaintiff herein, by depositing in the United States Post Office at Butte, Montana, on the 21st day of September, 1934, said copy securely sealed in an envelope addressed to Molumby, Busha & Greenan, Attorneys at Law, 325 Ford Building, Great Falls, Montana, and sent

under the Government frank, being the official frank of the United States Attorney for the District of Montana, no postage thereon being required; that the said Butte, Montana is the place of mailing of the said Notice of taking Deposition Under the Statute, that on the said date there was a regular communication by United States mail between said Butte, Montana and said Great Falls, Montana.

AUDREY VARCOE.

Subscribed and sworn to before me this 21st day of September, 1934.

HAROLD L. ALLEN,
Deputy Clerk, U. S. District Court,
District of Montana.

[Title of Court and Cause.]

DEPOSITION OF DR. ROBERT P. SMITH.

BE IT REMEMBERED: That pursuant to notice hereto attached, the matter of taking the deposition of Dr. Robert P. Smith, [266] a witness, on behalf of the Defendant, came on for hearing Monday, October 8, 1934, before Kenneth F. Frazer, Notary Public for Oregon; the defendant appearing by Gerald J. Meindl, Attorney, Department of Justice, the plaintiff not appearing.

DR. ROBERT P. SMITH,

being first duly sworn, testified as follows:

Questions by Mr. Meindl.

Please state your name.

A. Robert P. Smith.

(Deposition of Dr. Robert P. Smith.)

Q. Where do you live?

A. In Portland, Oregon.

Q. What is your profession?

A. I am a physician.

Q. What school or schools are you a graduate of?

A. I am a graduate of the University of Maryland, Johns Hopkins, medical school, and University of Pennsylvania, Philadelphia.

Q. In what years did you graduate?

A. I graduated in 1891, University of Maryland; in 1900, Johns Hopkins medical school, and 1901, post graduate, University of Pennsylvania.

Q. Have you specialized in any branch or branches of your profession?

A. I have.

Q. What branches have you specialized in?

A. Nervous and mental diseases.

Q. Have you studied in any special school?

A. In my specialty I was a post graduate of University of Pennsylvania, and I taught nervous and mental diseases at the Baltimore medical school for 1901 to 1909, when I moved to Seattle, Washington. [267]

Q. Doctor, are you a member of any medical society in conection with your specialty?

A. I am.

Q. Of what society are you a member?

A. I am an honor member of the American Psychiatric association, which is termed a fellow.

Q. Doctor, I hand you a document and ask you if your signature appears thereon?

A. It does.

(Deposition of Dr. Robert P. Smith.)

Q. What is that, Doctor?

A. That is an examination on Carl F. Noble, dated December 10, 1925.

Q. Do you remember Carl F. Noble, the plaintiff in this action?

A. Perfectly.

Q. Do you recall making that examination, Doctor?

A. I do.

Q. Doctor, using this examination report to refresh your memory along with your remembrance of the examination which you made of Carl F. Noble, will you state the type of examination you gave him?

A. I gave him a complete nervous and mental examination on the date specified.

Q. What date is that?

A. December 10th, 1925, in the City of Helena.

Q. Doctor, would you go into detail, and explain just how you made that examination. Did you make any tests?

A. His heart; and to stand with his eyes closed. Next were the reactions of his pupils. Thirdly, for tremors of eyelids, facial muscles, or extended fingers. And the next looked for was any atrophy or inco-ordination that might be found. Then his circulat- [268] ion termed as a vasomotor, which is the circulatory condition, was tested; then reflexes, both superficial and deep, were tested in order to determine any nervous condition that might be present.

Q. What were the results; what were your findings?

(Deposition of Dr. Robert P. Smith.)

A. My diagnosis was neuro, circulatory asthenia, with 20 per cent temporary disability, existing at that time, which was based on his complaints made on December 10th, 1925, plus a chronic myocarditis that the physical examiner had reported to me.

Q. Doctor, would you explain what neuro circulatory asthenia is, in ordinary terms?

A. That means disturbance of the circulation due to a nervous condition.

Q. Doctor, using the following definition as the basis for your answer, that is, any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, as being total disability; and that a total disability shall be deemed to be permanent disability whenever it is founded upon conditions which render it reasonably certain to continue throughout the life of the person suffering from it, using the above definition for the term of permanent and total disability, would you state whether or not in your opinion, that Carl F. Noble was permanently and totally disabled on December 10, 1925, at the time of your examination?

A. He was not.

Q. Will you explain why you say he was not permanently and totally disabled at that time?

A. Because the only disability that he had was a mild chronic heart trouble, with a nervous disturbance of circulation, which [269] placed him with the combined disabilities, as 45 per cent partially disabled.

(Deposition of Dr. Robert P. Smith.)

Q. Doctor, I now hand you a document, and ask you if your signature appears thereon?

A. It does.

Q. What is that document, Doctor?

A. That is a special nervous and mental report made on Carl F. Noble in the City of Helena, Montana, on December 12th, 1927.

Q. Doctor, using that report to refresh your memory, in what condition was the veteran on that day, in other words, what were your findings at that time?

A. My findings were the same as on the previous examination dated December 10, 1925; medically his disability was exactly the same that had been found on the previous examination. The only difference noted in this report is that he was then showing what term pre-senility, which means he looks much older than his years would indicate.

Q. Did you make the same type of examination December 12th, 1927 as you had December 10th, 1925?

A. Almost exactly the same type of examination.

Q. Doctor, I hand you another document, and ask you if your signature appears thereon?

A. It does.

Q. What is that document, Doctor?

A. That is an examination made and signed by a board of three, of which I was a member, on Carl F. Noble, in the City of Helena, dated February 13th, 1929.

(Deposition of Dr. Robert P. Smith.)

Q. Did you make the same type of examination on February 13, 1929 as you had on your two previous examinations?

A. I did. [270]

Q. And what were your findings on February 13, 1929?

A. The only difference noted is that there was a slight increase in tremors of his extended fingers. Otherwise his previous nervous condition that had been reported under date of December 10th, 1925, and December 12th, 1927, had improved.

Q. Had improved?

A. Had improved.

Q. Doctor, was a report made to you of the veteran's heart condition at that time?

A. There was.

Q. What were your findings?

A. Chronic myocarditis mild, with a disability recommended by the physical examiner as fifteen per cent.

Q. Doctor, using the definition which I have already given you as permanent and total disability, in your opinion was Carl F. Noble permanently and totally disabled at the date of your examination of February 13, 1929?

A. He was not. And was advised that medically his condition was stationary, and that another examination would be unnecessary.

Q. Doctor, did you, or did you not, on or about February 10, 1930, examine this veteran again?

A. I did.

(Deposition of Dr. Robert P. Smith.)

Q. What were your findings on that examination?

A. This examination was made at the U. S. Veterans hospital, Fort Harrison, Montana, February 10, 1930.

Q. What were your findings, Doctor?

A. My findings were asthenia, neuro circulatory, moderate, based on a few remaining nervous symptoms, plus the presence of a mild myocarditis, plus the fact that my notes read as follows: [271] "Claimant has been examined several times by the present examiner, and he is far more stable than heretofore seen."

Q. Does that indicate an improvement in 1930, Doctor?

A. It does.

Q. Is that improvement both in the heart condition and asthenia?

A. It has taken into consideration the entire disability of the man in making my recommendation.

Q. Doctor, I will hand you another document, and ask you if your signature appears thereon?

A. It does.

Q. What is that document?

A. That is an examination of Carl F. Noble made at the U. S. Veterans hospital 72, at Fort Harrison, April 21st, 1930.

Q. What were your findings on April 21st, 1930, Doctor?

A. Asthenia, neuro circulatory, with the following remarks pertaining thereto; this claimant is service connected on asthenia and neuro circulatory

(Deposition of Dr. Robert P. Smith.)

which is perpetuated, but symptoms scarcely seem justifiable at this time in such diagnosis.

Q. Referring back to the examination of February 10, 1930, I will ask you if an exercise test was given the veteran?

A. It was.

Q. What was the result of that exercise test?

A. Showed improvement with very slight deviation from a normal exercise test.

Q. Doctor, using the term of permanent and total disability which I gave you, again, on April 21st, 1930, was this veteran in your opinion permanently and totally disabled?

A. In my opinion this veteran has a permanent partial disability, but I have never seen him when I thought his condition was permanently total. [272]

Q. That is true on all these different times you examined him?

A. All five examinations; and those made in the latter years were showing a steady but gradual improvement.

Q. Doctor, you are familiar with various occupations and vocations are you not?

A. Yes.

Q. Could you name some types of work this veteran could do without physical detriment to himself?

A. I think this veteran can do any work of which he is educationally capable of performing, and any nature of work except severe physical labor, as such labor might increase his heart condition.

(Deposition of Dr. Robert P. Smith.)

Q. Doctor, during this examination have you based your testimony upon your own remembrance of this man, as well as the reports which you have been given here, which you signed?

A. I remember Carl F. Noble very well, but it wouldn't be humanly possible for me to have gone into details on my remembrance of the man without the assistance of my signed reports you gave me.

ROBERT P. SMITH, M. D.

In the District Court of the United States for the District of Montana. Great Falls Division.

No. 895

CARL F. NOBLE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

OFFICERS CERTIFICATE

State of Oregon,
County of Multnomah.—ss.

I, Kenneth F. Frazer, Notary Public for Oregon, [273] hereby certify: that pursuant to notice hereto attached to take the deposition of Dr. Robert P. Smith, a witness on behalf of Defendant, said matter came on before me Monday October 8, 1934, 10 o'clock a. m., at my office, 512 U. S. Court House, Portland, Oregon, the defendant appearing by

Gerald J. Meindl, Attorney, Department of Justice, the plaintiff making no appearance; that before said witness was allowed to testifiy he was by me duly sworn; that said deposition was reduced to writing in my presence and under my direction; that thereafter said deposition consisting of the foregoing typewritten pages numbered one to seven, inclusive, was carefully read over by said witness, and by him subscribed in my presence.

In Witness Whereof, I have hereunto set my hand, and affixed my notarial seal this 9th day of October, 1934.

KENNETH F. FRAZER,
Notary Public for Oregon.

My commission expires May 4, 1938.

Filed October 11, 1934.

C. R. GARLOW, Clerk.
C. G. Kegel, Deputy.

Whereupon

JOHN B. SULLIVAN,

a witness called and sworn on behalf of the Defendant, testified as follows:

Direct Examination by Mr. Brown:

My name is John B. Sullivan. I reside in Lewistown, Montana. My business or occupation at present is that of a National Bank Receiver. As such I am in charge as receiver of the books and the papers of the National Bank of Grass Range, Montana. It is in my hands as a receiver.

(Testimony of John B. Sullivan.)

Q. I will hand you a document marked Defendant's Exhibit 8, consisting of a number of sheets, and ask you what they are. [274]

A. They are the daily ledger sheets of an account in the bank, between June 11, 1922, and July 1st, 1930, standing in the name of Carl F. Noble, and they show deposits made from day to day, and withdrawals from day to day, and the balances remaining from day to day on that account. I have made a computation which shows the total amount of money that was deposited in that account from July, 1923, until July, 1930.

Q. And will you tell us Mr. Sullivan, the amount of money that was deposited between those dates in the account of Carl F. Noble in that bank.

Mr. MOLUMBY: Just a moment. To which we object on the grounds and for the reason that it is incompetent, irrelevant, and immaterial, tends to prove no issue whatever in this case; nothing to be shown that these deposits were made by the efforts of the plaintiff which is the only issue raised by the pleadings. The fact that the money may be deposited in an account in his name would not indicate in any way it was earned by him. It does not indicate that it came from his efforts or labor, or anything of that kind. It is material to no issue whatever in this case.

The COURT: Overrule the objection. Proceed.

A. To give this total I would have to rearrange the figures because you asked for the total from July, 1923, when the balance begins July 11, 1922, so that you will reframe your question.

(Testimony of John B. Sullivan.)

Q. I will ask you the question from June 11, 1922, until July 5th of 1930.

Mr. MOLUMBY: May we have our same objection to this question?

The COURT: Yes.

Mr. MOLUMBY: Note an exception.

A. The total shows that there was deposited between July 17, 1922, in The First National Bank of Grass Range, Montana and including [275] July 5, 1930, the sum of $22,082.23.

Mr. BROWN: We will offer at this time Defendant's Exhibit No. 8, if the court please, and ask that a copy may be made and the original returned to Mr. Sullivan.

The COURT: Very well.

Mr. MOLUMBY: To which we desire to object on the grounds that we have just stated in our previous objection.

The COURT: It may be admitted, and copy substituted.

Mr. MOLUMBY: We would like to have an exception.

(Defendant's Exhibit 8 shows total deposit of $22,082.23 from July 17th, 1922, in the First National Bank of Grass Range, Montana, up to and including July 5, 1930, and that on said date, July 5, 1930, there was a balance in the Bank of $142.44.)

Cross Examination by Mr. Molumby:

Q. Doctor, you know that it is the account of Carl F. Noble, the Plaintiff in this case?

A. I don't know the plaintiff in this case.

(Testimony of John B. Sullivan.)

Q. By the way, you are a Doctor, are you not?

A. I am a Doctor, yes. I don't know anything at all about where these deposits came from. I don't know whether they were actually deposited by one Carl F. Noble. I do not know that Carl F. Noble was physically there in Grass Range, or in that vicinity on any of the dates on which these deposits were made. I am not acquainted at all with Carl Noble, I don't know the gentleman. I was not with the bank in any capacity whatever at the date mentioned.

Mr. MOLUMBY: In view of the testimony, your honor, of the Doctor, that he did not know Carl Noble, who is the plaintiff in the case, and that this has reference to an account of the plaintiff, we move that the evidence of the Doctor be stricken [276] with reference to it, and with reference to Defendant's Exhibit 8, and that Defendant's Exhibit 8 also be stricken, and that the jury be admonished not to consider it.

Mr. BALDWIN: Not a doubt in the world that Carl F. Noble lived there.

Mr. MOLUMBY: There is testimony that he was away a great deal of that time.

Mr. BALDWIN: Yes, I made a deposit in my bank yesterday in Butte, and I am in Great Falls.

The COURT: It appears in evidence that he did business at this bank. I will overrule the objection.

DEFENDANT RESTS.

Mr. MOLUMBY: There is one matter that I would like to offer rebuttal on, but we are in an unfortunate situation. The Witness Harry Hillstrand who heretofore testified, a brother in law of Mr. Hillstrand, is being buried this afternoon. He is coming back, and if we could adjourn for a while, we could use him.

The COURT: We will stand in recess far a while, and just as soon as he comes in, notify me, so that we can proceed.

Whereupon a recess was had.

AFTER RECESS.

Mr. MOLUMBY: The record may show that the plaintiff also rests.

BOTH REST.

Mr. BALDWIN: Defendant now moves that this action be dismissed on the grounds stated in its motion at the close of Plaintiff's case. I take it the record may show by agreement of Counsel and with the consent of the court, that the grounds are inserted here, and not reported.

Mr. MOLUMBY: It is so stipulated. [277]

Mr. BALDWIN: The defendant now moves that the court direct a verdict in its favor on the grounds stated on its motion for a directed verdict made at the conclusion of the plaintiff's case. I assume that the record may likewise show that the grounds stated then are as given, and not reported.

Mr. MOLUMBY: Yes, it is so stipulated.

Mr. BALDWIN: And I wish to add to that, that plaintiff has wholly failed to prove a total disability, or a permanent disability within the time fixed by his pleadings in this case. On the further ground that the evidence in this case is insufficient to and does not tend to prove the necessary allegations of the pleadings. And on the added ground that it appears that the claim made relates to a period later than, and entirely without the limits fixed by the plaintiff's case.

The COURT: The motion will be denied.

Mr. BALDWIN: I ask an exception at this time to each of the rulings of the court. The ruling denying the motion to dismiss, and the ruling denying the motion for a directed verdict, and we would like ninety days from today, by an order entered on the minutes within which to prepare, serve, and file our Bill of Exceptions.

Mr. MOLUMBY: That is agreeable.

The COURT: Ninety days granted.

Mr. BALDWIN: I will ask that the record so show by the agreement of Counsel expressed in open court.

Thereupon, defendant's requested instructions Nos. 1, 7, 9, 10, 14, 15, 19, 20, 21 and 22, which had been reduced to writing and numbered by defendant's attorneys, together with a written request asking the same, signed by said attorneys, were delivered to the court.

That thereafter, the Court instructed the jury as follows:

INSTRUCTIONS OF COURT.

The COURT: Gentlemen, you have heard the evidence, and the arguments of Counsel for the respective parties, and again it becomes the duty of the court to advise you as to the rules of law that you are to apply in your interpretation of the evidence. [278]

You are the sole judges of the facts, which you are to apply to the facts, in order that you may readily reach a verdict. In this case the affirmative of the issues is upon the plaintiff to prove the material allegations of his complaint by a preponderance of the evidence. The plaintiff is not bound to prove his case beyond a reasonable doubt, as in criminal cases but is required to prove it by the preponderance of the evidence. This preponderance is not alone determined by the number of the witnesses testifying to a particular fact, or state of facts. In determining upon which side the preponderance of the evidence is, the jury shall take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testified; their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the case; the relation or connection, if any, between the witnesses and the parties. The apparent consistency fairness and congruity of the evidence, the probability or improbability of the truth of their several statements, in view of all the other

evidence in the case, and from all these facts determine upon which side is the weight or preponderance of the evidence. If you believe then any witnesses who have testified in this case knowingly and wilfully testified falsely concerning any matter or fact material to the elements of the cause of action herein, as defined in these instructions, his or her testimony is to be distrusted by you as to all other matters and facts to which he or she testified. You may not arbitrarily and capriciously disregard testimony of a witness who is not impeached in any of the usual modes known to the law, if his testimony is reasonable and consistent with all the other circumstances proven bearing upon the material issues involved in this case. The usual modes of [279] impeachment of a witness known to the law, as mentioned in the preceding instructions are first, by proving contradictory statements previously made by the witness as to matters relative to his testimony in the case.

Second; By disproving facts testified to by him.

And Third: By evidence as to his general bad character, but whether a witness has been impeached is solely for the Jury to determine from all the evidence in the case.

You are instructed that it is admited by the parties, plaintiff and defendant in this action, that at all times mentioned in the Complaint the plaintiff was a citizen of the United States and a resident of the State of Montana; that he enlisted in the armed forces of the United States on September

20, 1919, and served the defendant from that date down to and including the 30th day of July, 1919, when he was discharged from the army. That between said dates plaintiff made application for insurance under the provisions of Article 4 of the War Risk Insurance Act of Congress, and the Rules and Regulations of the War Risk Bureau established by said Act in the sum of ten thousand dollars and that thereafter there was duly issued to plaintiff by said War Risk Insurance Bureau a Certificate of his compliance with the War Risk Insurance Act, so as to entitle him to the benefits of said Act, and the other Acts of Congress relating thereto, and the Rules and Regulations promulgated by the War Risk Insurance Bureau and the Veterans Bureau and the Director thereof, and that during the time of his service in said Army there was deducted from his pay for said premiums by the United States Government, through its proper officers the monthly insurance premiums provided by said Act, and the Rules and Regulations promulgated by the War Risk Insurance Bureau, [280] the Veterans Bureau and the Director thereof; that on January 22, 1931, plaintiff made application to the United States Government through the Veterans Bureau, and the director thereof; and the Bureau of War Risk Insurance and the director thereof; the Veterans Administration and the director thereof, for the payment of said insurance and for the monthly payments claimed to be due under the provisions of said War Risk Insurance Act for total permanent disability.

In his complaint plaintiff claims that during the period of his service in the War with Germany and its allies and on and between September 20, 1917, and July 30, 1919, and while said insurance was in full force and effect the plaintiff contracted certain diseases and disabilities and suffered certain injuries which said diseases, injuries and disabilities have continued since the date of his discharge from the defendant's army, July 30, 1919, rendered and still does render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases and disabilities and injuries are of such a nature and founded upon such conditions that it is reasonable to suppose and believe that it will continue throughout the life of the plaintiff to render the plaintiff unable to follow any substantially gainful employment. The defendant denies each of these allegations and as a result of that denial the burden is upon the plaintiff to prove to your satisfaction by a preponderance of the evidence that these allegations are true and if it does not appear to your satisfaction by a preponderance of the evidence in this case that these allegations are true, your verdict must be for the defendant.

Plaintiff's claim in this case is based upon a contract of insurance entered into by and between him and the defendant,— [281] the United States of America, under which it promised and agreed to pay to him a specified sum in monthly installments in the event that he died or became totally and permanently disabled during the life of the policy. The

action is purely one on contract and the burden is upon the plaintiff to prove to your satisfaction by a preponderance of the evidence in this case that at some time prior to July 30, 1919, he became totally and permanently disabled.

Permanent partial disability is not sufficient to justify a verdict for the party suing upon a war risk insurance contract.

It cannot be said that injury or disease, sufficient merely to prevent one from again doing work of the kind he had been accustomed to perform, constitutes the disability meant by the war risk insurance Act, and though it may appear to you by a preponderance of the evidence in this case that the plaintiff is not able to do the work that he did or to follow the occupation that he followed prior to his enlistment in the army, that alone is not sufficient to justify a verdict for the plaintiff in this case.

Evidence as to plaintiff's condition subsequent to his discharge from the army on July 30, 1919, may be considered by you only for the purpose of determining his condition while the contract upon which plaintiff bases his claim of right was in force that is prior to July 30, 1919.

In arriving at your verdict in this case, you are not at liberty to consider any testimony that may have been introduced on the trial concerning compensation said to have been paid by the United States to the plaintiff in his action. The right to compensation and the right to recover under a war risk insurance contract are based upon separate

and distinct causes, involve [282] separate and distinct rights and the right to one does not of necessity or at all give the right to the other.

The plaintiff in this case claims that he was totally and permanently disabled on the 30th day of July, 1919, it is admitted by the pleadings in this case that he made no application to the defendant or any of its boards or agencies for the payment of anything under the war risk insurance policy involved in this case until January 22, 1931. The rule is that in the absence of clear and satisfactory evidence explaining, excusing, or justifying it this long delay in making this claim is to be taken as strong evidence that he was not totally and permanently disabled before the policy on which this case is based, lapsed.

You are instructed that the plaintiff's conduct following the alleged accrual of his claim reflects his own opinion as to whether he was totally and permanently disabled at the time his insurance policy lapsed.

You are instructed that the mere fact that insured has not worked does not establish the fact that he was unable to work.

It is presumed that official duty has been regularly performed. A Doctor examining soldiers for induction into the United States Army is a public officer and acts as such and it is presumed that he properly and honestly performs his duty in examining the man and made a true and honest report of his findings. These presumptions have the weight

and effect of evidence and are binding upon you and you must find according to the presumption unless you are satisfied from other evidence that the presumption is not true.

You are instructed that evidence of the Insured's condition subsequent to the lapse of his policy may be considered only for the purpose of determining his condition while the contract was in force. [283]

You are instructed that in arriving at your verdict in this case you must not consider anything but the testimony presented during the trial of the case and the law as given to you by the Court.

Gentlemen: The statute upon which this action is based reads as follows: (that portion that is material) Section No. 300 of War Risk Insurance Act.

"In order to give every commissioned officer and enlisted man, and to every member of the Navy Nurse Corp, female, when employed in the active service under the War Department or Navy Department protection for themselves and their dependents, the United States upon application shall grant United States Government Life Insurance, converted insurance against the death or total permanent disability of any such person in any multiple of Five Hundred Dollars, and not less than One Thousand Dollars, or more than Ten Thousand Dollars upon the payment of the premiums as hereinafter provided, such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation."

Mr. Justice Holmes of the United States Supreme

Court has rendered a decision recently, which may throw some light on the present case.

"The certificate of insurance provided in terms that it should be 'subject in all respects to the provision of such Act (of 1917) of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the act, shall constitute the contract'. These words must be taken to embrace changes in the law no less [284] than changes in the regulations. The form was established by the Director with the approval of the Secretary of the Treasury and on the authority of Article I, Section 1, and Article IV, Section 402, of the Act, which, we have no doubt, authorized it. The language is very broad and does not need precise discussion when the nature of the plan is remembered. The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the Government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself, for the soldiers good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the Government's hands to that extent no one else could explain. The only relations of contract were between the Government and him."

You are instructed that if you find from the evidence that Carl F. Noble became totally and permanently disabled, as defined in these instructions, on or prior to the date to which his insurance was paid, it is immaterial whether the diseases, injuries, or disabilities, causing his total permanent disability were contracted prior to the date of his enlistment in the army, or during the time he was in the army, or whether it was contracted subsequent to his discharge from the army, if he became totally and permanently disabled, as those terms are in these instructions defined, at a time prior to July 30, 1919, his insurance then matured and became payable.

You are instructed that you are to consider the term "Total Disability," as any impairment of mind or body which renders it [285] impossible for the insured to follow a substantially gainful occupation without seriously impairing his health, and that said total disability is to be considered by you as permanent when it is of such nature as to render it reasonably certain that it will continue throughout the lifetime of the insured.

You are instructed that total disability does not mean helplessness or complete disability, but it includes more than that which is partial. Permanent disability means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of

itself sufficient to defeat his claim of permanent total disability. He may have worked when really unable and at the risk of endangering his health or life. If the plaintiff is able to follow a gainful occupation only spasmodically with frequent interruptions due to his disability, or if his periods of work are more or less regular and continuous, were done at the risk of endangering his health or life, he was then totally and permanently disabled within the meaning of his contract, and the War Risk Insurance Act; but on the other hand, if he was able to follow a gainful occupation regularly without frequent interruptions because of his disability, then he would not be totally and permanently disabled.

You are instructed that in determining whether the said Carl F. Noble is totally disabled, you may take into consideration his previous occupation, learning, and experience, in so far as it is shown from the evidence.

You are instructed that for the purposes of this action, the plaintiff must have been taken to be in sound physical condition when he enlisted in the defendant's army. [286]

You are instructed that if you should find from the evidence that Carl F. Noble became totally and permanently disabled as defined in these instructions from on or prior to July 30, 1919 the date of his discharge, and remained so totally and permanently disabled thereafter, that then his insurance did not lapse on October 1919, nor on any other date for nonpayment of premiums.

Testimony has been given by certain witnesses in this case, who in law are termed experts, and in this connection you are advised that while in cases, such as the one being tried, the law requires the evidence of men, experts in certain lines, as to their opinions derived from their knowledge of particular matters the ultimate weight which is to be given to the testimony of expert witnesses is a question to be determined by the jury, and there is no rule of law which requires you to surrender your own judgment based upon credible evidence to that of any person testifying as an expert witness. In other words the testimony of an expert like that of any other witness is to be received by you and given such weight as you think it is properly entitled to receive. The value of such testimony depends upon the circumstances of each case, and of these circumstances the jury must be the judge. When experts testify to matters of fact from personal knowledge, then their testimony as to such facts within their personal knowledge, should be considered the same as that of any other witness or witnesses who testified from personal knowledge. The plaintiff must prove his case by a preponderance of the evidence, still the proof need not be the direct evidence of persons who saw the occurrences sought to be proved. The facts may also be proved by circumstancial evidence, that is, by proof of circumstances, if any, such as give rise to a reasonable inference in the minds of the jurors of the truth of the facts [287] alleged and sought to be proven, provided such circumstances, if any together with all

the evidence in the case, constitute a preponderance of the evidence.

You will not be influenced, gentlemen, by colloquy, or dispute between counsel during the trial, or between counsel and the court, or between the court and counsel, or witnesses, or remarks or statements not based upon the evidence.

You will base your verdict solely upon the evidence submitted to you, and wholly disregard remarks of counsel not based upon the evidence, and wholly disregard anything you may have heard or read outside of the evidence, and any evidence erroneously admitted, and afterwards excluded, you will also disregard.

In this case, gentlemen, as in all others we have tried, you will accept the law as given you by the court, but you are the exclusive judges of the facts; the credibility of the witnesses and the weight to be given their testimony.

If there is a real or apparent conflict in the evidence, it is your duty to reconcile that conflict, so that all may stand, if it can be done. It is within your province to determine what you will accept as true, and what you will reject as false. In determining what weight you will give to the testimony of a witness you may consider all his evidence, whether it be reasonable or unreasonable, sustained or unsustained, whether it be corroborated by other credible evidence, and the knowledge that the witness has of the facts to which he testified; the intelligence of the witness; whether or not the witness

has been impeached; his opportunity of knowing or recollecting the facts about which he testified; his manner upon the witness stand; any bias or prejudice he may have exhibited toward or against plaintiff or defendant; his interest; if any, in the suit, and any and [288] all other facts and circumstances in evidence which in your minds go to increase or diminish the weight of such evidence.

Now, Gentlemen, it does not seem necessary for the court to go over the pleadings with you. The pleadings will be given you for consideration. When you retire to your jury room—there is really but one issue in the case, and the issue here is whether the plaintiff was on or before the date of his discharge July 30, 1919, totally and permanently disabled, and whether that condition of total and permanent disability is likely to continue throughout the lifetime of the plaintiff.

It takes twelve of your number to agree on a verdict. You should select one of your number to act as foreman, and he will sign your verdict when you agree. Are there any exceptions?

Mr. MOLUMBY: We have none.

Mr. BALDWIN: The Defendant objects and excepts to the refusal of the court to give its requested instruction number 1. The Defendant objects and excepts to the refusal of the court to give its requested instruction No. 9. The defendant objects and excepts to the refusal of the court to give its requested instruction No. 10. The defendant objects and excepts to the refusal of the court to give its requested instruction No. 14. The defendant ob-

jects and excepts to the refusal of the court to give its requested instruction No. 15. The defendant objects and excepts to the refusal of the court to give its requested instruction No. 19. The defendant objects and excepts to the refusal of the court to give its requested instrucion No. 20. The defendant objects and excepts to the refusal of the court to give its requested instruction No. 21. The defendant objects and excepts to the refusal of the court to give its requested instruction No. 22. The defendant objects and excepts to the [289] giving of that portion of instruction No. 1, requested by the plaintiff in the action, dealing with what Justice Holmes said in the case of Emma White against United States of America for the following reason. That the statement made by the learned Judge was made in argument and for the purpose of illustrating a point that he was making, and it is not the statement of a principle of law, that should be properly submitted to the jury. That the statement made by the learned Judge was made with special reference to an action brought on a converted policy of insurance, and has no application to an action brought upon a yearly renewable term policy, such as that involved in the case at Bar.

That the law is not as stated by the learned justice, that the position of the Government is one of benevolence, the fact being as a matter of law that the question for decision is based entirely upon contract, the right to which must be established by a preponderance of the evidence, and the money claimed must be shown by that degree of evidence

to have been earned within the terms of the policy. That the statement in that portion of the instruction that the relation was one of benevolence is apt to and probably will lead the jury to believe that they are not dealing with an ordinary suit or contract, but one which justifies the consideration of an added element—a benevolent duty on the part of the Government to compensate the soldier for what he may suffer, though it is not shown to be within the terms of the policy upon which this action is based. That the statement of the learned Justice that the matter is one of new experiment, and so on, is not within the issues; is not based on a fact appearing in the record here, and is merely the view of the learned Justice, in his opinion. [290]

Defendant objects to the giving by the court of plaintiff's requested instruction No. 2 for the reason that the statements contained in it, carry the issues on a matter to be determined by the jury, far beyond the issues as framed by the pleadings in this case, relate to extraneous matters and will justify a verdict against the defendant in the case so that the jury are not satisfied by a preponderance of the evidence that the case is within the terms of the policy, or that the plaintiff in the case was from the date of his discharge, July 30, 1919, permanently and totally disabled within the meaning of the law.

Defendant objects to the giving of instruction No. 4 requested by the plaintiff in this case for the reason that the same relates to and covers matters not based upon any evidence appearing in the case. To

illustrate the statement, "He may have worked when really unable and at the risk of endangering his health for life" is not based upon one word or syllable of testimony. There was not a word of testimony in the case properly before the court for consideration.

Defendant objects to the giving of instruction No. 5 requested by the plaintiff in this case for the reason that it contains an incorrect statement of the law, and it is not based upon the testimony in this case, there being no evidence in the record of this case, during the trial as to the learning of the plaintiff, Carl Noble, or of his experience, other than his experience in the occupation of a farmer.

Defendant objects to the giving of the instruction with reference to total and permanent disability on the ground and for the reasons following:

That it does not contain a correct statement of the principle of law; that it is involved, and may because of that involvement [291] mislead the jury; that it tends rather to confuse the mind rather than to enlighten the mind of the jury in arriving at their verdict, and that it wholly fails to include within its terms one of the essential elements laid down in Lumbra against the United States, in this that it wholly omits a definition as given by that court as follows: "But manifestly work performed may be such as conclusively to negative total and permanent disability at the earliest time"—in this case the date of the discharge of the plaintiff from the army July 30, 1919.

Defendant's instructions Nos. 1, 7, 9, 10, 14, 15,

19, 20, 21, 22, which were refused by the Court are in words and figures as follows, to-wit:

Defendant's Requested Instruction No. 1.

You are instructed to find your verdict for the defendant in this case.

Defendant's Requested Instruction No. 7.

You are instructed that vocational training was given to veterans disabled in the service during the World War only after a determination that such veteran was unable to follow the occupation or occupations which he had followed prior to the World War.

Defendant's Instruction No. 9.

The burden is on the plaintiff in this case to show with reasonable certainty by a clear preponderance of the evidence that he was totally and permanently disabled while the policy was in force,—that is on or after September 20th, 1917, and prior to July 30th, 1919, and could not thereafter continuously follow any gainful occupation; it is not enough for him to show that he was temporarily totally disabled at times or that he was permanently partially disabled. If it does not appear by a preponderance of the evidence in this case that the plaintiff became totally [292] and permanently disabled on or between September 20th, 1917, and July 30, 1919, your verdict must be for the defendant for at least two elements, total disability and permanent disability, must concur before plaintiff has a right to recover in the action.

In determining whether plaintiff was totally and

permanently disabled prior to July 30, 1919, the test is whether he, at that time, had a disability which rendered it impossible for him to follow continuously any substantially gainful occupation, founded upon conditions which then indicated with reasonable certainty that such impairment would continue throughout his life and unless plaintiff has proven by a preponderance of the evidence that prior to July 30, 1919, he had a disability which rendered it impossible for him to follow continuously any substantially gainful occupation and that the conditions were then such as to indicate with reasonable certainty that it would be impossible for him to follow continuously any substantially gainful occupation throughout his life, your verdict must be for the defendant.

Defendant's Instruction No. 14.

The vital date in this case is July 30, 1919, and unless you are satisfied by a preponderance of the evidence in this case that on that date the plaintiff Carl F. Noble was wholly unable to follow any substantially gainful occupation and that his condition was then such and of such a nature and founded on such conditions that it was reasonable to suppose and believe that he would be wholly unable to follow any substantially gainful occupation throughout the remainder of his lifetime, your verdict in this case must be for the defendant.

Defendant's Instruction No. 15.

Whenever a party has by his own declaration, act or omission intentionally and deliberately led an-

other to believe a particular [293] thing to be true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify; and as it appears from the testimony of the plaintiff in this case himself and entirely without contradiction that at the time he applied for his discharge from the United States Army he was asked the following questions and gave the following answers in writing, to-wit:

Q. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of health, whether or not incurred in military service?

A. Yes.

Q. If so describe the disability stating the nature and kind of wound, injury or disease.

A. Hearing.

Q. When was the disability incurred?

A. Couple of months ago.

Q. Where was the disability incurred?

A. France.

Q. State the circumstances, if known, under which the disability was incurred?

A. Unknown.

and by such declarations and acts, intentionally and deliberately led the defendant and it officers and agents to believe that he did not then have any reason to believe that he was then suffering from the effects of any wound, injury or disease or have any disability or impairment of health whether or not incurred in military service, except as stated there-

in, and thus secured his discharge from said Army, he cannot now be permitted [294] to falsify said statement. (Sub-division 3, Section 10, 605, R. C. M.; 1921; Section 631, Title 28, U. S. C.)

Defendant's Requested Instruction No. 19.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict and therefore, if a weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence should be reviewed with distrust. (Sub-divisions 6 and 7, Section 10, 672, R. C. M. 1921; Section 631, Title 28, U. S. C.)

Defendant's Requested Instruction No. 20.

A wife cannot be examined against her husband without his consent; nor can a wife, during the marriage or afterwards, be, without the consent of her husband, examined as to any communication made by him to her during the marriage. (Sub-division 1, Section 10, 536, R. C. M. 1921; Section 631, Title 28, U. S. C.)

Defendant's Requested Instruction No. 21.

A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. (Sub-division 4, Section 10, 536, R. C. M. 1921; Section 631, Title 28, U. S. C.)

Defendant's Requested Instruction No. 22.

You are instructed that the plaintiff in this action is now estopped from claiming that at the time of his discharge from the United States Army he was suffering from the effects of any wound, injury or disease or that he had any disability or impairment of health, whether or not incurred in the military service. [295]

(Section 10, 605, R. C. M. 1921; Section 631, Title 28, U. S. C.)

[Title of Court and Cause.]

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff, and against the defendant, and assess his damages in the amount of the installments of War Risk Insurance accruing from and after the 30th day of July, 1919, the date of his discharge.

C. H. PACKARD,
Foreman.

Filed Nov. 1, 1934.

That on November 1, 1934 the attorneys for the plaintiff and defendant signed their stipulation, which, after the title of court and cause, is in words and figures as follows:

> "IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, acting through their respective counsel of record, that the defendant may have and is hereby granted ninety days from this date in which to prepare, serve and file a bill of exceptions herein;

IT IS FURTHER STIPULATED AND AGREED that an order may be made by the Judge of the above entitled court giving and granting to the defendant ninety days from this date in which to prepare, serve and file a bill of exceptions in the above entitled cause.

Dated this 1st day of November, 1934."; [296]

And thereafter, and on November 1, 1934 said Stipulation so signed as aforesaid, was filed in the above entitled court and cause, and subsequently on that day the Honorable Charles N. Pray, the Judge who tried said action, signed and filed an Order, which, after the title of court and cause, is in words and figures as follows:

"Pursuant to the stipulation of the parties hereto, it is ordered and this does order that the defendant above named may have and is hereby granted ninety days from and after the 1st day of November, 1934 in which to prepare, serve and file its bill of exceptions in the above entitled cause.

Dated this 1st day of November, 1934.

CHARLES N. PRAY,
Judge."

That on November 17, 1934 the Honorable Charles N. Pray, the Judge who tried said cause, signed and filed therein an order which, after the title of court and cause, is as follows:

"IT IS HEREBY ORDERED, and this does order, that the term at which the trial of the

above entitled action was had be, and it is, hereby extended to and including the day on which defendant's bill of exceptions is finally settled.

Dated this 17th day of November, 1934.

CHARLES N. PRAY,
Judge."

AND NOW within the time allowed by law and the extension of time granted by the court, the defendant prepares and files herein its proposed Bill of Exceptions, embodying an order of the Judge granting the defendant ninety days within which to prepare, serve and file its Bill of Exceptions herein, stipulation of counsel relating thereto and an order of the Judge extending the term at which the above entitled cause was tried to and including the day upon which defendant's Bill of Exceptions is finally [297] settled; embodying all of the rulings of the court and proceedings had on the trial of said cause, the exhibits offered and received, and prays that the same be allowed, signed and settled and filed as defendant's Bill of Exceptions.

JAMES H. BALDWIN,
United States Attorney for the
District of Montana.
R. LEWIS BROWN,
Assistant United States
Attorney.
FRANCIS J. McGAN,
Attorney,
Department of Justice.
(Attorneys for Defendant)

Service of the foregoing Bill of Exceptions and receipt of a copy thereof is hereby acknowledged this 23 day of January, A. D. 1935.

MOLUMBY, BUSHA & GREENAN,
By C. T. Busha, Jr.,
(Attorneys for Plaintiff)

And thereafter, and on the 2nd day of February, 1935, and within the time allowed, the plaintiff duly and regularly proposed his amendments to the said Proposed Bill of Exceptions of the Defendant, which said amendments are, after omitting the title of the Court and cause, in words and figures as follows, to-wit:

COMES NOW, the Plaintiff in the above entitled action and respectfully proposes the following amendment to the proposed bill of exceptions lodged with the court.

That that portion of the Bill of Exceptions from line 8 on page 182, to and including line 19 on page 192, be stricken.

Also throughout the entire transcript there are many misspelled words and typographical errors too numerous to except to and which should be corrected by stipulation in order to have the transcript understandable to the higher court.

MOLUMBY, BUSHA & GREENAN,
Attorneys for Plaintiff. [298]

And thereafter, and on the 4th day of February, 1935, the above entitled Court by its order duly given and made set Tuesday, the 12th day of February, 1935, at ten o'clock A. M., as the day set for the settlement of said Proposed Bill of Exceptions;

And thereafter, and on the 12th day of February, 1935, at ten o'clock A. M., at the Court House of said Court at Great Falls, Montana, the Court proceeded with the settlement of said Bill of Exceptions, Molumby, Busha & Greenan being present as counsel for the plaintiff and R. Lewis Brown, Assistant United States Attorney, being present as counsel for the defendant, and

Thereupon the said proposed amendments to said defendant's Proposed Bill of Exceptions was denied by the Court, to which said ruling of the Court the plaintiff then and there asked for and was by the Court granted an exception, and

Thereupon the Court signed, settled and allowed the said Bill of Exceptions.

CERTIFICATE.

The undersigned Judge, who tried the above entitled action, hereby certifies that the above and foregoing is a full, true and correct bill of exceptions in said action and contains all of the evidence introduced, proceedings had, and the exceptions taken in the trial of said action; and,

IT IS ORDERED, and this does order that the above and foregoing be approved, allowed and

settled as a true and corerct bill of exceptions herein. Within the judgment term or as extended.

Dated this 12th day of February, 1935.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed February 12, 1935. [299]

Thereafter, on January 23, 1935, Assignment of Errors and Prayer for Reversal was duly filed herein, in the words and figures following, to-wit: [34]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS
AND
PRAYER FOR REVERSAL.

Comes now the United States of America, the defendant in the above-entitled action, by its attorneys, and in connection with its petition for appeal, says that in the record and proceedings had in the above-entitled action manifest error has intervened to the prejudice of the defendant, upon which it will rely in the prosecution of its appeal herein, to-wit:

I.

The Court erred in overruling defendant's objection to the introduction of any testimony in the case, to which action of the Court defendant then and there duly excepted as follows:

"Mr. BALDWIN: At this time the Defendant objects to the introduction of any testimony in this

case upon the grounds and for the reasons following, that the court is without jurisdiction of the person of the defendant.

(2) That the court is without jurisdiction of the subject of the action.

(3) That the defendant cannot without its consent be sued, and it has not consented to be sued in this action.

(4) That the complaint fails to state a cause of action.

(5) That it is not shown by the complaint in this case that the plaintiff has brought himself within the provisions of the statute authorizing the bringing of an action against the defendant in this case. That it appears from the complaint in [35] the case that there has been no denial of any claim made by the plaintiff by the Administrator of the Veterans Administration, and finally that it does not appear on the face of the pleadings in this case that the action was brought within the time within which an action of this kind might be brought.

The COURT: I will overrule the objection.

Mr. BALDWIN: I will ask an exception." (p. 2, line 12 to line 1, p. 3.)

II.

The Court erred in overruling defendant's objection to the following question asked of the witness Matson by counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted as follows:

"Q. Do you see any difference in his appearance from the time you first saw him up until the present time?

A. I think I do.

Q. What is that difference?

Mr. BALDWIN: Object to this as immaterial and too remote; fifteen years after the occurrence.

The COURT: Overrule the objection.

Mr. BALDWIN: Note an exception.

A. Well, he is much weaker now than he was. He is bedfast.

Q. What, if any, difference have you noticed with reference to his nervous condition over those years?

A. Well, it is quite similar now as to what it was then." (p. 87, line 24 to p. 88, line 5.)

III.

The Court erred in overruling defendant's objection to the introduction of plaintiff's exhibit No. 1, offered by counsel for the plaintiff, to which ruling of the court defendant then and there duly excepted, as follows:

"Q. I will show you what is marked Plaintiff's Exhibit 1 [36] for the purposes of identification, and ask you if that is the affidavit that counsel on cross examination has been questioning you. Is that the affidavit he has been questioning you about?

A. I would judge so.

Q. Is that the one that he handed to you and asked you to examine?

Mr. BALDWIN: We will admit that it is.

Mr. MOLUMBY: We offer Plaintiff's Exhibit No. 1 in evidence.

Mr. BALDWIN: We object to certain portions of it, as it is clearly evident from the testimony here that they are hearsay.

Mr. MOLUMBY: I think we are entitled to have the whole portion go in.

Mr. BALDWIN: That is the condition of Carl Noble in 1919, which was two years before this witness ever saw him. He didn't meet him until 1921.

The COURT: I don't see how you now can object to any portion of it going in. You have examined so thoroughly in regard to that affidavit, unless you can show where it can be separated.

Mr. BALDWIN: Probably I can clear the matter. That is the only objection, because he swears he knew the condition of the man two years before he ever saw him.

Mr. MOLUMBY: There is the difficulty of examining a witness concerning something that is not in evidence. Then later he does not like the rest of it. I think where a portion has gone into the examination, the whole thing is entitled to go in.

The COURT: I think I will let it go in without any reservation at all.

Mr. BALDWIN: We will ask an exception.

Whereupon, Plaintiff's Exhibit No. 1 was received in evidence and is in words and figures as follows, to-wit:

"PLAINTIFF'S EXHIBIT NO. 1. [37]

State of Montana,
County of Fergus.—ss.

I, Charles Matson, living in Grass Range, Montana, after being duly sworn, do make the following statements:

That I have known Carl Noble for many years. I know that he has had heart trouble ever since he was discharged from the army in 1919.

The reason that I know that his heart was in bad shape is that I have been troubled with sickness a great deal myself the last few years, and as usual when two sick persons get together they compare notes.

Mr. Carl Noble was a frequent customer at my barber shop and I had a good chance to exchange views with him regarding our health. I know that he quit using tobacco and advised me to do the same. I also know that he was getting some medicine from the drug store for his heart.

I remember very well that he had a bad spell with his heart in June and July, 1921 and that he was unable to do manual labor after the fall of 1921, although he did drive a team a short while after this time.

He was in my barber shop the day he left for Great Falls, Montana, to have his appendix removed. As I shaved him that day I asked him if he was not afraid to undergo an operation on account of the condition of his heart. He told me he was, but that he would have to risk it anyway.

I know that he went to the hospital in the spring of 1923 and was there for six or seven weeks. He left for the hospital in St. Paul. Minn., in February, 1924 and he is still there.

The reason that I make the above statements are that I am informed that service connection of his disability has been taken away from him because of insufficient evidence as to his heart condition prior to the appendicitis operation, and I know that he was troubled with his heart from soon after he was discharged [38] from the army in 1919 until he left for St. Paul, Minn. and because of myself being on the sick list we often talked about his condition and my own.

I have no personal interest in his claim and am in no way related to him.

Charles E. Matson

Subscribed and sworn to before me this 12th day of January, 1925.

Geo. Breckenridge
Notary Public, for the State of Montana,
Residing at Grass Range.

My commission expires May 1st, 1925.

True copy seen by me this 17th day of Feb., 1925.

Antoinette Zicher
Notary Public, Minn.

Commission expires April 11, 1930.

Filed March 9, 1925." (p. 92, line 18 to p. 95, line 4.)

IV.

The Court erred in sustaining plaintiff's objection to the following question asked of the witness, Mrs. Noble, by counsel for the defendant and not permitting said witness to reply thereto, to which ruling of the Court defendant then and there duly excepted:

"Q. Can you tell me how much money Mr. Noble deposited in the bank in any year since your marrige?

Mr. MOLUMBY: We object to that as not proper cross examination.

The COURT: I think so. Sustain the objection.

Mr. BALDWIN: Note an exception." (p. 122, lines 24-28).

V.

The Court erred in overruling defendant's objection to the following question asked of the witness, Dr. Alred, by counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted:

"Q. And will you state to the jury just what your findings were, upon your examination of him?

A. I was asked to see Mr. Noble to see if his condition was such that he might come into court.

Mr. BALDWIN: I object to that as immaterial.

[39]

The COURT: Yes.

Q. Just state what your findings were.

A. I found a very sick man; a man who was too weak to stand unassisted; anemic, nervous; stuttered in trying to answer questions; complained of a

multitude of symptoms including vomiting, palpitation, weakness, loss of appetite or no appetite. I don't know of any more complaints. I found upon my physical examination of him an anemic man that was unable to stand unassisted; who has gross tremor of the hands or other muscles; the legs are very atrophied from disuse. He has a distinct stutter or imperfect speech when asked a question, and from his history I found it difficult to get any intelligent history. He has thought his symptoms so long——

Mr. BALDWIN: We object to what he thought about it, as a conclusion.

The COURT: Yes that is a conclusion. Strike it out.

A. In answering questions as to what he complained of, he stated things which were not explained, making it difficult to state what his complaints really are. As to whether I examined his pulse and heart, I did not examine him that evening, but at a later date I examined him, complete physical examination.

Mr. BALDWIN: That examination was for the purpose of testifying, was it not?

A. The later examination was for the purpose of testifying.

Mr. BALDWIN: I object to that as incompetent, irrelevant and immaterial.

The COURT: What part of it, all of it?

Mr. BALDWIN: No, the part that is for the purpose of testifying. He has not given him treat-

ment with any idea of prescribing merely for coming into court and testifying.

WITNESS: I have the patient under treatment at the present time.

Mr. BALDWIN: We also add the ground that it is too remote. [40]

The COURT: I will overrule the objection.

Mr. BALDWIN: We will note an exception. May we have a general objection and exception along this line to each question.

The COURT: Yes.

Q. Do you recall the question?

A. Yes. I examined his pulse and his blood pressure, heart rate sounds. He carries a constant high pulse rate. 99 to 100 or better. His blood pressure is from 182 to 202. His heart sounds are similar in character; shows a weak myocarditis. That means heart muscles. I should have said his reflexes are exaggerated. I mean the reflexes, such as the jaw, the muscles of the arm, the abdomen. That is the tentative reflexes which are indicative of his present nervous disturbances. Laboratory tests show the degree of his anemia. I did not make the laboratory test, I had them made. As to what else I observed in his physical examination, upon my examination, the outstanding thing besides his physical condition is the apparent mental disturbance. It is such that I classify him as a definite neurotic, which is not mild at all. As to what was apparent to me from my examination of his heart condition that I have described, it was apparent that he had no reserve, that his heart is being taxed to

the utmost constantly, so much so that an exertion would endanger his life. As to how severe an exertion, I will say that I would not feel that he would be able, as an example, to be walking about without endangering himself. As to whether there is anything else in his condition that I have not as yet described, that I discovered, he showed evidence of past care; he had a scar in his abdomen of an operation for appendicitis; and he has another scar below the right rib margin which is operative in character, and from which I am told a tumor was removed." (p. 130, line 24 to p. 132, line 30).

VI.

The Court erred in overruling the defendant's objection to the following question asked of the witness, Dr. Alred, by [41] counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted:

"Q. Will you state what your diagnosis of the plaintiff's condition is?

Mr. BALDWIN: We object to that as immaterial, what his present diagnosis shows; too remote.

The COURT: He may answer.

Mr. BALDWIN: Note an exception.

A. His diagnoses are multiple; they are as follows: anemia, nephritis, chronic; myocarditis; hypertension; arterial sclerosis and psychoneurosis; atrophy of the legs from disuse; enlarged prostate. I will state what I mean by anemia, it means less than a normal amount of red blood content. By

nephritis, it means an impairment of the kidneys. Myocarditis means a weak heart, attack of the heart muscles. Hypertension means an increase over a normal amount of blood pressure. Arterial sclerosis means the hardening of the arteries on some or all parts of the body. Atrophy of the legs means that both in size and ability have shrunken, or disappeared." (p. 133, lines 7-23.)

VII.

The Court erred in overruling defendant's objection to the following question asked of the witness, Dr. Alred, by counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted:

"Q. Doctor, defining the term total disability as follows: Total disability being any impairment of mind or body which renders it impossible for the insured to follow a substantially gainful occupation without seriously impairing his health and that total disability is to be considered as permanent when it is of such a nature as to render it reasonably certain that it will continue throughout the lifetime of the plaintiff, and that total disability does not mean helplessness or complete disability, but includes more than that which is [42] partial; permanent disability means that which is continuing as opposed to that which is temporary; that distinct periods of temporary disability do not constitute that which is permanent. That the mere fact that

one has done some work is not of itself sufficient to defeat one's claim of permanent total disability. He may have worked when really unable and at the risk of endangering his health or life. If one is able to follow a gainful occupation only spasmodically, with frequent interruptions due to his disability, or if the periods of work, though more or less regular and continuous were done at the risk of endangering his health or life, he was nevertheless totally and permanently disabled, but on the other hand, if he was able to follow a gainful occupation regularly without frequent interruptions because of his disability, then he would not be totally and permanently disabled. And taking into consideration, Doctor, the examination you made of the plaintiff, and considering these facts to be true that Carl Noble enlisted in the United States Army on the 20th day of September, 1917, and served in the United States Army down to and including the 30th day of June, 1919, in the 60th Infantry of the 5th Division, first going to Spokane, Washington, then to Camp Gettysburg, Pa., thence to Camp Green, Charlotte, North Carolina, and while at Camp Green had the mumps, reported to the Infirmary and the doctor ordered him back to duty, and that that same afternoon again reported to the Infirmary and was examined by two doctors who decided there was nothing wrong with him; that he then reported to the Infirmary again the next morning and he was given castor oil and marked 'duty', and went back to camp and took a detail out to clean out ditches, and the

next morning the mumps went down on him, and he then again reported to the Infirmary, and the doctor told him he had had the mumps but was over them; that he had a swelling in the groin and testicles and was moved to Camp Merritt while in that condition, and was there in bed for a couple of days while in quarantine, and remained in quarantine for about a week with no duties to perform, and at the end of the quarantine went to Hoboken and [43] boarded ship for France on the 16th of April, 1919. Upon arriving in France was sent up to the front with his division in the Alsace-Lorraine Sector and was 15 days under shell fire in that sector, he being a waggoner whose duty it was to go up with the supply train from the railheads to the front line, and thereafter was 39 days under shell fire in an area south of St. Mihiel, and later was under shell fire for 10 days in the St. Mihiel, and still later 39 days under shell fire in the Meuse Argonne, and that he was gassed in the St. Mihiel offensive, vomitted and was sick to his stomach, had diarrhea, felt sick and sore in the chest for a week or ten days; then later while in the Argonne was again gassed and vomitted frequently for several days and had diarrhea which remained with him until after the Armistice was signed, and on neither of these two occasions reported to the hospital or Infirmary for treatment; that while in the Argonne near Mont Foucan a shell exploded under the wagon he was driving, tearing off a portion of the wagon, the end gate and brake, the team hitched to the

wagon running away and piling up at the foot of the mountain with the plaintiff tangled up in the pile-up; that five days later had aged greatly and from then on was extremely nervous, excitable and would stutter when he talked, would wave his arms and looked wild, had starey eyes, would scream and yell at the horses and men, and even at the officers, and that this condition remained with him all during the rest of his service in the army and existed at the time of his discharge from the army and has remained at all times since then to the present date; that after this experience the plaintiff did not report to the hospital or Infirmary for treatment; that after the Armistice was signed he proceeded with his regiment to Luxemburg, and while in Luxemburg had the influenza and was laid up in his billet in bed for four or five days, and when he got up was sick and was a long time getting his strength back, and thereafter and until his discharge had very little to do as far as duty was concerned until he came back to this country with [44] his regiment and was discharged; that after his attack of flu in Luxemburg he was short of breath and got fatigued quickly and at the time of his discharge from the army was nervous, soft, couldn't stand much exertion and when he exerted himself was short of breath and the veins in his neck would throb, his ears would throb and he would have palpitation, and that on the 31st day of December, 1918, the plaintiff was cited for devotion to duty during the St. Mihiel and Argonne offensives.

Mr. BALDWIN: We object to that part as immaterial.

The COURT: Yes, it is immaterial.

Mr. MOLUMBY: Disregard that statement with reference to the citation to devotion to duty.

That after being discharged from the army he returned to his home in Grass Range, Montana and lived with his brother on the ranch occupied by him prior to his entry into the army, doing no work that Fall or Summer except that he did some plowing and when plowing would find himself rigid and stiff on the plow, would then relax and before he had gone 30 rods would be in the same condition—just as tight as a fiddle string; that his work would be interrupted because of sleepless nights; he would get to palpitating and the bed would seem to shake and when he didn't work he wasn't troubled much, but when he worked would be restless, his heart would pound and he could feel the bed shake, he would have night-mares and troubled dreams. Most of them were connected with the men hollering; these fellows in his dreams had liquid fire on them and were hollering and he would want to put the fire out and imagined that he had it on himself sometimes even though he had never personally encountered liquid fire while in the army, or at all. If he worked after a night of that kind, it would be worse the next night; that that winter of 1919 and 1920 he did not do any work and in the spring of 1920 his brother put in the crop on his ranch and it was necessary for them to hire a fellow a few days at a

time because the plaintiff was unable to go ahead with the work, [45] but did some of the easiest jobs; that the plaintiff drove the team some and could stand it a while and then would have to quit; that that summer and fall the crop was harvested by his brother and hired help; that in the spring of 1921, the plaintiff worked upon the seeding of 30 acres for about a day and had to quit because he was sick, and his brother and one Bert Ingram put in the crop on the place in 1921; that that summer the crop was harvested and threshed by his brother and Bert Ingram; that in the summer of 1921 the summer fallowing of about 50 acres was done by his brother and one Bert Ingram and in the spring of 1922 his brother and a hired man put in 40 or 50 acres of summer fallow and 30 acres of spring wheat, the plaintiff doing a little of the work in seeding for a day or two at a time; that since that time the plaintiff has attempted to do no work whatever and has been unable to do any work whatever; that in the fall of 1919, in November, he procured a mixture of digitalis from the druggist in Grass Range and at which time he had a jumpy throbbing pulse and palpitation, a temperature of 99.6, shortness of breath, an eye stare, was nervous, fidgity, haggard and stuttered. Thereafter, and over a period of 18 months off and on he procured a similar medicine from the druggist; that in February, 1923, he was examined by Dr. Porter of Lewistown and found to be suffering from heart trouble and extreme nervousness, and was advised to go to the

Government hospital; that when he first returned from the army he was weak and pale, had aged greatly while in the army; had become grey haired, was short of breath, was highly nervous, excitable, stuttered, would get incoherent when talking and used his hands and his hands fluttered when talking; that this condition has existed ever since his discharge from the army, this condition of nervousness that I have just described has existed ever since his discharge, to the present date; that he has gradually grown a little worse; that he was in the Deaconess Hospital and operated on for appendicitis in June or July of 1922 and was in the Veterans' Bureau Hospital at Fort Harrison in 1923 for about six weeks in the early spring, and in the following February went to the U. S. Veterans' Bureau Hospital in St. Paul known as [46] the Aberdeen Hospital, and was in bed for a period of 13 or 14 months, and then returned to his ranch at Grass Range and was again hospitalized in 1931 in Helena for 6 or 7 weeks and again in the spring of 1932 was in the hospital at Fort Harrison, Helena, Montana for three weeks, and again in the spring of 1933, was hospitalized at Lewistown, for a couple of weeks, and transferred from the hospital at Lewistown to the hospital at Fort Harrison where he remained for a period of nine months, at which time he was brought home on a stretcher, and has remained in bed ever since, and up to the present date. Assuming these facts to be true, Doctor, and

taking into consideration what you observed of the plaintiff on your examination of him, and defining total disability as I have heretofore in this question defined it, state whether or not the plaintiff, Carl Noble, was or was not in your opinion totally and permanently disabled on the date of his discharge from the army, July 30, 1919?

Mr. BALDWIN: We object to that as incompetent, irrelevant and immaterial, and not justified by the record in this case, and as being an improper statement as to what constitutes permanent and total disability. Permanent and total disability at law means this, and this only: any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. That the supposed definition of total and permanent disability read by counsel into the question is used in the argument by the Supreme Court of the United States, and not from the statement of any definite rule.

On the further ground that there are included in the question matters not shown by any proof in the case, and there are omitted from the question material matters which might reasonably change the conclusion of the expert, if stated to him, which do appear from the records in this case. [47]

The COURT: Overrule the objection.

Mr. BALDWIN: I will ask an exception.

2. Taking those as facts and your definition, he was undoubtedly totally and permanently disabled at the time of discharge. He was undoubtedly totally and permanently disabled if those be true facts in following your definition.

Q. Date at what time?

A. At the time of discharge." (R. 132, line 24 to p. 140, line 4.

VIII.

The court erred in overruling defendant's motions made at the close of the plaintiff's evidence that the case be dismissed and that a verdict be directed in favor of the defendant, to which action of the court defendant then and there duly excepted, as follows:

"Mr. Ellis: Defendant now moves that the case be dismissed on the following grounds:

That the government cannot, without its consent, be sued, and it has not consented to be sued in this action; that the court has no jurisdiction of the person of the defendant; that the court has no jurisdiction of the subject of the action; that the complaint fails to state facts sufficient to constitute a cause of action; that it appears definitely from the complaint that no claim of any claim made by the plaintiff was ever presented to or decided by the administrator of the Veterans Administration; that it appears definitely from the proof of the plaintiff, made by the deposition of Carl F. Noble, the plaintiff here, that it is admitted that the only decision upon which he bases his claim of right to

suit is based upon an apparent judgment by the Insurance Claims Council, that as a result of his advice failed to carry his claim to a conclusion, and to avail himself of all remedies within the Veterans' Administration. He has failed to place himself in a position where he has a right to sue the Government or maintain an action in this [45] court.

On the further ground that it appears definitely from the proof put in by plaintiff that there is a material variance between the claim on which he bases his right to sue here and the theory of recovery as allowed and the claim as stated in this complaint in this action.

Defendant now moves that the Court direct a verdict for the defendant in this case on the grounds stated in its motion that the action be dismissed, and on the added ground that by its complaint, or by his complaint, the plaintiff has limited himself to a specified date, May 1, 1919, the date of his discharge from the army, and his claim for disability, as proven by him, relates to a later date.

The COURT: Overruled.

Mr. BALDWIN: We will ask an exception."

(p. 168, line 18 to p. 170, line 13)

IX

The Court erred in permitting plaintiff to amend his complaint herein after the close of the plaintiff's evidence, to which action of the Court defendant then and there duly excepted.

"The COURT: Is there any variance in the proof and your allegation?

Mr. MOLUMBY: In this respect only: the allegation of the complaint is that the Director of the Veterans Bureau and the Bureau of War Risk Insurance, by recent Act of Congress, has changed their name and call it the Veterans Administration.

The COURT: Isn't that the way it was when the complaint was filed?

Mr. BALDWIN: Yes.

Mr. MOLUMBY: I think they changed the name prior to the filing of this complaint. I would ask leave to amend the allegation of the complaint to add, on page 3, line 1, after the words 'Bureau of War Risk Insurance' the following words, [49] 'And the Veterans Administration.' In line 6 before the words, or the word 'Insurance' by adding the words 'And Veterans Administration,' and after the word 'Directors' add the words 'And Administrators'. I would ask leave to amend that.

The COURT: I will allow the amendment. Call in the Jury.

Mr. BALDWIN: Note an exception." (p. 170, line 19 to p. 171, line 6.)

X.

The Court erred in overruling the motion made by the defendant at the close of all the evidence that the action be dismissed, to which ruling of the Court defendant then and there duly excepted as follows:

"Mr. BALDWIN: Defendant now moves that this action be dismissed on the grounds stated in its motion at the close of plaintiff's case. I take it the

record may show by agreement of counsel and with the consent of the Court, that the grounds are inserted here, and not reported.

Mr. MOLUMBY: It is so stipulated.

* * * * * * * *

The COURT: The motion will be denied.

Mr. BALDWIN: I ask an exception at this time to each of the rulings of the court. The ruling denying the motion to dismiss, and the ruling denying the motion for a directed verdict, and we would like ninety days from today, by an order entered on the minutes, within which to prepare, serve, and file our Bill of Exceptions." (p. 195, lines 25-30; p. 196, lines 15-21.)

XI.

The Court erred in overruling the motion made by the defendant at the close of all the evidence for a directed verdict in its favor, to which action of the Court defendant then and there duly excepted as follows:

"Mr. BALDWIN: The defendant now moves that the court direct a verdict in its favor on the grounds stated on its motion for a directed verdict made at the conclusion of the [50] plaintiff's case. I assume that the record may likewise show that the grounds stated then are as given, and not reported.

Mr. MOLUMBY: Yes, it is so stipulated.

Mr. BALDWIN: And I wish to add to that, that plaintiff has wholly failed to prove a total disability, or a permanent disability within the time fixed by his pleadings in this case. On the further ground

that the evidence in this case is insufficient to and does not tend to prove the necessary allegations of the pleadings. And on an added ground that it appears that the claim made relates to a period later than, and entirely without the limits fixed by the plaintiff's case.

The COURT: The motion will be denied.

Mr. BALDWIN: I ask an exception at this time to each of the rulings of the Court. The ruling denying the motion to dismiss, and the ruling denying the motion for a directed verdict, and we would like ninety days from today, by an order entered on the minutes, within which to prepare, serve and file our Bill of Exceptions." (p. 196, lines 1-21.)

XII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 1, as follows:

"Defendant's requested instruction No. 1.

You are instructed to find your verdict for the defendant in this case." (p. 210, lines 13-15.)

To which action of the Court defendant then and there duly objected and excepted as follows:

"Mr. BALDWIN: The defendant objects and excepts to the refusal of the court to give its requested instruction No. 1." (p. 207, lines 15-16.)

XIII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 9, as follows:

"Defendant's instruction No. 9.

The burden is on the plaintiff in this case to show with reasonable certainty by a clear preponderance of the evidence [51] that he was totally and permanently disabled while the policy was in force,—that is, on or after September 20th, 1917, and prior to July 30th, 1919, and could not thereafter continuously follow any gainful occupation. It is not enough for him to show that he was temporarily totally disabled at times or that he was permanently partially disabled. If it does not appear by a preponderance of the evidence in this case that the plaintiff became totally and permanently disabled on or between September 20th, 1917 and July 30, 1919, your verdict must be for the defendant for at least two elements, total disability and permanent disability must concur before plaintiff has a right to recover in the action." (p. 210, line 21 to p. 211, line 4.)

To which action of the Court defendant then and there duly objected and excepted as follows:

"The defendant objects and excepts to the refusal of the court to give its requested instruction No. 9." (p. 207, lines 16-18.)

XIV.

The Court erred in refusing to give to the jury defendant's requested instruction No. 10, as follows:

"Defendant's requested instruction No. 10.

In determining whether plaintiff was totally and permanently disabled prior to July 30, 1919, the test is whether he, at that time, had a disability which rendered it impossible for him to follow continu-

ously any substantially gainful occupation, founded upon conditions which then indicated with reasonable certainty that such impairment would continue throughout his life and unless plaintiff has proven by a preponderance of the evidence that prior to July 30, 1919, he had a disability which rendered it impossible for him to follow continuously any substantially gainful occupation and that the conditions were then such as to indicate with reasonable certainty that it would be impossible for him to follow continuously any substantially gainful occupation throughout his life, your verdict must be [52] for the defendant." (p. 211, lines 5-17.)

To which action of the Court defendant then and there duly objected and excepted as follows:

"The defendant objects and excepts to the refusal of the court to give its requested instruction No. 10." (p. 207, lines 18-20.)

XV.

The Court erred in refusing to give to the jury defendant's requested instruction No. 14 as follows:

"Defendant's instruction No. 14.

The vital date in this case is July 30, 1919, and unless you are satisfied by a preponderance of the evidence in this case that on that date the plaintiff Carl F. Noble was wholly unable to follow any substantially gainful occupation and that his condition was then such and of such a nature and founded on such conditions that it was reasonable to suppose and believe that he would be wholly unable to follow

any substantially gainful occupation throughout the remainder of his lifetime, your verdict in this case must be for the defendant." (p. 211, lines 18-27.)

To which action of the Court defendant then and there duly objected and excepted as follows:

"The defendant objects and excepts to the refusal of the court to give its requested instruction No. 14." (p. 207, lines 20-21.)

XVI.

The Court erred in refusing to give to the jury defendant's requested instruction No. 15 as follows:

"Defendant's instruction No. 15.

Whenever a party has by his own declaration, act or omission intentionally and deliberately lead another to believe a particular thing to be true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify; and as it appears from the testimony of the plaintiff in this case himself and entirely without contradiction that at the time he applied for [53] his discharge from the United States Army he was asked the following questions and gave the following answers in writing, to-wit:

"Q. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of health, whether or not incurred in military service?

A. Yes.

Q. If so describe the disability stating the nature and kind of wound, injury or disease.

A. Hearing.

Q. When was the disability incurred?

A. Couple a months ago.

Q. Where was the disability incurred?

A. France.

Q. State the circumstances, if known, under which the disability was incurred?

A. Unknown.

and by such declarations and acts, intentionally and deliberately led the defendant and its officers and agents to believe that he did not then have any reason to believe that he was then suffering from the effects of any wound, injury or disease or have any disability or impairment of health whether or not incurred in military service, except as stated therein, and thus secured his discharge from said Army, he cannot now be permitted to falsify said statement. (subdivision 3, Section 10, 605, R. C. M.; 1921; Section 631, Title 28, U. S. C.)" (p. 211, lines 28 to p. 213, line 2.)

To which action of the Court defendant then and there duly objected and excepted as follows:

"The defendant objects and excepts to the refusal of the court to give its requested instruction No. 15." (p. 207, lines 22-23.)

XVII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 19 as follows:

"Defendant's requested instruction No. 19.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict and therefore, if a weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence should be reviewed with distrust. (Sub-divisions 6 and 7, Section 10, 672, R. C. M. 1921; Section 621, Title 28, U. S. C.)" (p. 213, lines 3-11.)

To which ruling of the Court defendant then and there duly objected and excepted as follows:

"The defendant objects and excepts to the refusal of the court to give its requested instruction No. 19." (p. 207, lines 23-25.)

XVIII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 22 as follows:

"Defendant's requested instruction No. 22.

You are instructed that the plaintiff in this action is now estopped from claiming that at the time of his discharge from the United States Army he was suffering from the effects of any wound, injury or disease or that he had any disability or impairment of health, whether or not incurred in the military service. (Section 10, 605, R. C. M. 1921; Section 631, Title 28, U. S. C.)" (p. 213, line 24 to p. 214, line 1.)

To which ruling of the Court defendant then and there duly objected and excepted as follows:

"The defendant objects and excepts to the refusal of the court to give its requested instruction No. 22." (p. 207, lines 28-30.)

XIX.

The Court erred in charging and instructing the jury as follows:

"Mr. Justice Holmes of the United States Supreme Court has rendered a decision recently, which may throw some light [55] on the present case.

'The certificate of insurance provided in terms that it should be "subject in all respects to the provisions of such Act (of 1917) of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the Act, shall constitute the contract." These words must be taken to embrace in the law no less than changes in the regulations. The form was established by the Director with the approval of the Secretary of the Treasury and on the authority of Article I, Section 1, and Article IV, Section 402 of the Act, which, we have no doubt, authorized it. The language is very broad and does not need precise discussion when the nature of the plan is remembered. The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the Government to them, if not paternal, was at least avuncular.

It was a relation of benevolence established by the Government at considerable cost to itself, for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the Government's hands to that extent, no one else could complain. The only relations of contract were between the Government and him.'" (p. 202, line 21 to p. 203, line 17.)

Defendant's objection to said instruction being as follows:

"The defendant objects and excepts to the giving of that portion of instruction No. 1, requested by the plaintiff in the action, dealing with what Justice Holmes said in the case of Emma White against United States of America for the following reasons: That the statement made by the learned Judge was made in argument and for the purpose of illustrating [56] a point that he was making, and it is not the statement of a principle of law, that should be properly submitted to the Jury. That the statement made by the learned Judge was made with special reference to an action brought on a converted policy of insurance, and has no application to an action brought upon a yearly renewable term policy, such as that involved in the case at bar.

That the law is not as stated by the learned Justice, that the position of the Government is one of benevolence, the fact being as a matter of law that the question for decision is based entirely upon con-

tract, the right to which must be established by a preponderance of the evidence, and the money claimed must be shown by that degree of evidence to have been earned within the terms of the policy. That the statement in that portion of the instruction that the relation is one of benevolence is apt to and probably will lead the jury to believe that they are not dealing with an ordinary suit or contract, but one which justified the consideration of an added element,—a benevolent duty on the part of the Government to compensate the soldier for what he may suffer, though it is not shown to be within the terms of the policy upon which this action is based. That the statement of the learned Justice that the matter is one of new experiment, and so on, is not within the issues; is not based on a fact appearing in the record here, and is merely the view of the learned Justice, in his opinion." (p. 207, line 30 to p. 208, line 30.)

XX.

The Court erred in charging and instructing the jury as follows:

"Plaintiff's requested instruction No. 2.

You are instructed that if you find from the evidence that Carl F. Noble became totally and permanently disabled as defined in these instructions, on or prior to the date to which his insurance was paid, it is immaterial whether the diseases, injuries, or disabilities, causing his total permanent disability were contracted prior to the date of his enlistment

in the army, [57] or during the time he was in the army, or whether it was contracted subsequent to his discharge from the army, if he became totally and permanently disabled, as those terms are in these instructions defined, at a time prior to July 30, 1919, his insurance then matured and became payable." (p. 203, lines 18-28.)

Defendant's objection to said instruction being as follows:

"Defendant objects to the giving by the court of plaintiff's requested instruction No. 2 for the reason that the statements contained in it carry the issues on a matter to be determined by the jury, far beyond the issues as framed by the pleadings in this case, relate to extraneous matters and will justify a verdict against the defendant in the case so that the jury are not satisfied by a preponderance of the evidence that the case is within the terms of the policy, or that the plaintiff in the case was from the date of his discharge, July 30, 1919, permanently and totally disabled within the meaning of the law." (p. 209, lines 1-10.)

XXI.

The Court erred in charging and instructing the jury as follows:

"Plaintiff's requested instruction No. 4.

"You are instructed that total disability does not mean helplessness or complete disability, but it includes more than that which is partial. Permanent disability means that which is continuing as opposed

to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of permanent total disability. He may have worked when really unable and at the risk of endangering his health or life. If the plaintiff is able to follow a gainful occupation only spasmodically with frequent interruptions due to his disability, or if his periods of work are more or less [58] regular and continuous, were done at the risk of endangering his health or life, he was then totally and permanently disabled within the meaning of his contract, and the War Risk Insurance Act; but on the other hand, if he was able to follow a gainful occupation regularly without frequent interruptions because of his disability, then he would not be totally and permanently disabled." (p. 204, lines 6-23.)

Defendant's objection to said instruction being as follows:

"Defendant objects to the giving of instruction No. 4, requested by the plaintiff in this case for the reason that the same relates to and covers matters not based upon any evidence appearing in the case. To illustrate the statement, 'He may have worked when really unable and at the risk of endangering his health or life,' is not based upon one word or syllable of testimony. There was not a word of testimony in the case properly before the court for consideration." (p. 209, lines 11-18.)

XXII.

The Court erred in charging and instructing the jury as follows:

"Plaintiff's requested instruction No. 5.

You are instructed that in determining whether the said Carl F. Noble is totally disabled, you may take into consideration his previous occupation, learning and experience, in so far as it is shown from the evidence." (p. 204, lines 24-27.)

Defendant's objection to said instruction being as follows:

"Defendant objects to the giving of instruction No. 5 requested by the plaintiff in this case for the reason that it contains an incorrect statement of the law, and it is not based upon the testimony in this case, there being no evidence in the record of this case during the trial as to the learning of the plaintiff, Carl Noble, or of his experience, other than his experience in the occupation of a farmer." (p. 209, lines 19-25.) [59]

XXIII.

The Court erred in charging and instructing the jury as follows:

"You are instructed that you are to consider the term 'Total Disability' as any impairment of mind or body which renders it impossible for the insured to follow a substantially gainful occupation without seriously impairing his health, and that said total disability is to be considered by you as permanent when it is of such nature as to render it

reasonably certain that it will continue throughout the lifetime of the insured.

You are instructed that total disability does not mean helplessness or complete disability, but it includes more than that which is partial. Permanent disability means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of permanent total disability. He may have worked when really unable and at the risk of endangering his health or life. If the plaintiff is able to follow a gainful occupation only spasmodically with frequent interruptions due to his disability, or if his periods of work are more or less regular and continuous, were done at the risk of endangering his health or life, he was then totally and permanently disabled within the meaning of his contract, and the War Risk Insurance Act; but on the other hand, if he was able to follow a gainful occupation regularly without frequent interruptions because of his disability, then he would not be totally and permanently disabled." (p. 203, line 29 to p. 204, line 23.)

Defendant's objection to said instruction being as follows:

"Defendant objects to the giving of the instruction with reference to total and permanent disability on the ground and for the reasons following:

That it does not contain a correct statement of the [60] principle of law; that it is involved, and may because of that involvement, mislead the jury; that it tends rather to confuse the mind rather than to enlighten the mind of the jury in arriving at their verdict, and that it wholly fails to include within its terms one of the essential elements laid down in Lumbra against the United States, in this, that it wholly omits a definition as given by that court as follows: 'But manifestly work performed may be such as conclusively to negative total and permanent disability at the earliest time.'—In this case the date of the discharge of the plaintiff from the army, July 30, 1919." (p. 209, line 26 to p. 210, line 9.)

XXIV.

The evidence is insufficient to justify the verdict.

XXV.

There is nothing in the evidence in this case tending to show that at the time the insurance upon which plaintiff bases his claim, lapsed, he was totally and permanently disabled.

XXVI.

The verdict is against law.

XXVII.

When measured by the rules of law as stated by the Court in its charge to the jury the evidence in this case does not justify and is insufficient to support the verdict rendered in this case.

XXVIII.

It affirmatively appears from the evidence that plaintiff was not permanently and totally disabled from following continuously a substantially gainful occupation at the time of his discharge from the army and subsequent thereto.

XXIX.

The evidence affirmatively discloses that the plaintiff was able to and did follow a substantially gainful occupation for some years after his discharge from the army at which he earned substantial sums of money. [61]

XXX.

The Court erred in refusing to enter judgment in favor of the defendant as requested by it at the close of the testimony, to which action of the Court defendant duly excepted.

XXXI.

The Court erred in entering judgment in favor of the plaintiff and against the defendant.

XXXII.

The Court was without jurisdiction to enter the judgment that it entered in this action.

WHEREFORE, for such errors defendant prays that the judgment of the District Court of the United States for the District of Montana, Great Falls Division, dated November 1, 1934, be set aside

and vacated and this case remanded for a new trial.

JAMES H. BALDWIN,
United States Attorney for
the District of Montana.
R. LEWIS BROWN,
Assistant United States
Attorney.
FRANCIS J. McGAN,
Attorney,
Department of Justice.
(Attorneys for Defendant)

Service of the above and foregoing Assignment of Errors admitted and copy thereof received at Great Falls, Montana this 23 day of Jan., 1935.

MOLUMBY, BUSHA & GREENAN,
By C. T. Busha, Jr.,
(Attorneys for Plaintiff)

[Endorsed]: Filed Jan. 23, 1935. [62]

Thereafter, on January 23, 1935, Petition for Appeal was duly filed herein, in the words and figures following, to-wit:

[Title of Court and Cause.]

PETITION FOR APPEAL.

The above-named defendant, feeling itself aggrieved by the rulings of the Court during the trial of the above-entitled action and the order and final

judgment entered therein on the 1st day of November, 1934, does hereby appeal from the said rulings of the Court and said order and judgment, and each and every part thereof to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors presented herewith, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by law and the rules of said Court in such cases made and provided.

JAMES H. BALDWIN,
United States Attorney for
the District of Montana,
Butte, Montana.
R. LEWIS BROWN,
Assistant United States
Attorney, District of Montana,
Butte, Montana.
FRANCIS J. McGAN,
Attorney,
Department of Justice,
Butte, Montana.
(Attorneys for Defendant and
Appellant) [64]

Service of the above and foregoing Petition for Appeal acknowledged and copy thereof received at

Great Falls, Montana this 23 day of January, 1935.

MOLUMBY, BUSHA & GREENAN,
Great Falls, Montana.
By C. T. Busha, Jr.,
(Attorneys for Plaintiff and Appellee)

[Endorsed]: Filed Jan. 23, 1935. [65]

Thereafter, on January 23, 1935, Order Allowing Appeal was duly filed herein, in the words and figures following, to-wit: [66]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The defendant in the above-entitled action having filed therein its petition that an appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment made, rendered and entered of record in the above-entitled Court and action on November 1, 1934, and that a citation be issued as provided by law and a transcript of the records, proceedings and papers upon which said order and judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by law and the rules of said Court in such cases made and provided and being fully advised of the law and the facts and it appearing therefrom to be a proper case therefor, Now Therefore:

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the

Ninth Circuit from the order and judgment heretofore entered and filed herein on the 1st day of November, 1934, as aforesaid, be and the same is hereby allowed; and,

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations, said order and judgment, and all proceedings in the above-entitled action be forthwith transmitted by the Clerk of the above-entitled Court to said United States Circuit Court of Appeals for the Ninth [67] Circuit.

Done in open Court at Great Falls, Montana, this 23rd day of January, 1935.

CHARLES N. PRAY,
Judge of the District Court
of the United States,
District of Montana.

Service of the above and foregoing Order acknowledged and copy thereof received at Great Falls, Montana this 23 day of January, 1935.

MOLUMBY, BUSHA & GREENAN,
Great Falls, Montana.
By C. T. Busha, Jr.,
(Attorneys for Plaintiff and Appellee)

[Endorsed]: Filed Jan. 23, 1935. [68]

Thereafter, on January 23, 1935, Stipulation and Order for Diminution of Record was duly filed herein, in the words and figures following, to-wit: [69]

[Title of Court and Cause.]

STIPULATION FOR DIMINUTION OF RECORD.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that in the printing of the transcript of the record therein the title of the Court and the title of the cause on the pleadings and documents need not be printed in full, but may be entitled thus.—"Title of Court and Cause," and that the endorsement on each of such papers and documents, except the filing endorsement, may also be omitted.

Dated January 23, 1935.

JAMES H. BALDWIN,
United States Attorney for the
District of Montana,
Butte, Montana.
R. LEWIS BROWN,
Assistant United States Attorney
District of Montana,
Butte, Montana,
FRANCIS J. McGAN,
Attorney, Department of Justice,
Butte, Montana.
(Attorneys for Defendant
and Appellant)
MOLUMBY, BUSHA & GREENAN,
Great Falls, Montana.
By C. T. Busha, Jr.,
(Attorneys for Plaintiff and Appellee)

It is so ordered:

CHARLES N. PRAY,
Judge of the United States
District Court,
District of Montana.

[Endorsed]: Filed Jan. 23, 1935. [70]

Thereafter, on January 23, 1935, Citation, issued by the Judge on January 23, 1935, was duly filed herein, the original Citation being hereto annexed and in words and figures as follows, to-wit: [71]

[Title of Court and Cause.]

CITATION.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal in the above-entitled action of record in the office of the Clerk of the District Court of the United States for the District of Montana, Great Falls Division, wherein the United States of America is appellant and Carl F. Noble is appellee, to show cause, if any there be, why the judgment rendered and entered against the defendant and appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties hereto in that behalf.

Witness, the Honorable Charles N. Pray, Judge of the District Court of the United States for the District of Montana, this 23rd day of January, 1935.

CHARLES N. PRAY,
Judge of the District Court
of the United States,
District of Montana. [72]

Service of the above and foregoing Citation admitted and copy thereof received at Great Falls, Montana, this 23 day of January, 1935.

MOLUMBY, BUSHA & GREENAN,
By C. T. Busha, Jr.,
(Attorneys for Plaintiff and
Appellee)

[Endorsed]: Filed Jan. 23rd, 1935. [73]

Thereafter, on January 23, 1935, Praecipe for Transcript was duly filed herein, in the words and figures following, to-wit: [75]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the above-entitled Court:
Sir:

Please prepare and certify record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled action and include therein the following papers and documents:

1. Summons and Marshal's return endorsed thereon;
2. Complaint;
3. Answer;

4. Judgment;
5. Bill of Exceptions;
6. Assignment of Errors;
7. Petition for Appeal;
8. Order allowing appeal;
9. Stipulation and Order for Diminution of Record;
10. Citation;
11. Clerk's Certificate;
12. Stipulation of counsel granting defendant ninety days from date to prepare, serve and file its Bill of Exceptions;
13. Order of Judge granting defendant ninety days from date to prepare, serve and file its Bill of Exceptions;
14. Order of Judge extending the term until Defendant's Bill of Exceptions is finally settled; [76]
15. Defendant's requested instructions not given by the court; and
16. This Praecipe.

Dated this ..... day of January, 1935.

JAMES H. BALDWIN,
United States Attorney for the
District of Montana,
Butte, Montana.

R. LEWIS BROWN,
Assistant United States Attorney
District of Montana,
Butte, Montana.

FRANCIS J. McGAN,
Attorney, Department of Justice,
Butte, Montana.

(Attorneys for Defendant
and Appellant)

Service of the above and foregoing Praecipe acknowledged and copy thereof received at Great Falls, Montana, this 23 day of January, 1935.

MOLUMBY, BUSHA & GREENAN,
By C. T. Busha, Jr.,
(Attorneys for Plaintiff and Appellee)

[Endorsed]: Filed Jan. 23, 1935. [77]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana.—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing two volumes, consisting of 299 pages, numbered consecutively from 1 to 299 inclusive, is a full, true and correct transcript of all portions of the record and proceedings in case No. 895, Carl F. Noble vs. United States of America, which have by praecipe been designated to be incorporated into said transcript, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of Fifty and 50/100 Dollars, ($50.50), and have been made a charge against the United States.

WITNESS my hand and the seal of said court at Helena, Montana, this 15 day of Feb., A. D. 1935.

[Seal] C. R. GARLOW, Clerk.

By....., Deputy. [300]

[Endorsed]: No. 7776. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Carl F. Noble, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed February 18, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7776.

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

CARL F. NOBLE,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

Brief for the Appellant

WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.

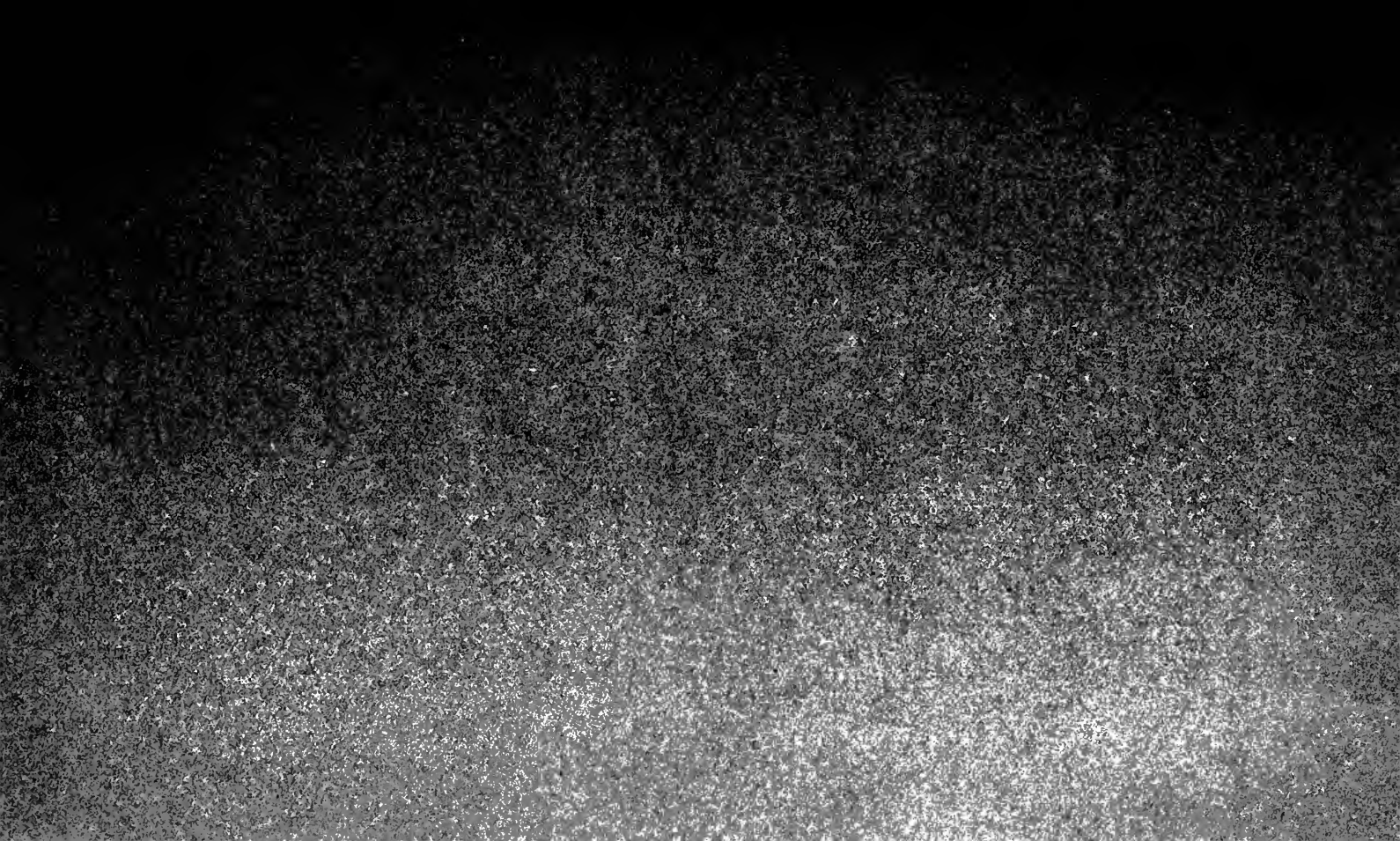
KEITH L. SEEGMILLER,
Attorney, Department of Justice.

JOHN B. TANSIL,
United States Attorney.

R. LEWIS BROWN,
Assistant United States Attorney.

FRANCIS J. McGAN,
Attorney, Department of Justice.

GATES & ROBERTS, PRINTERS



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No. 7776.

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

CARL F. NOBLE,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE.

Carl F. Noble, appellee, hereinafter called plaintiff, brought suit against the United States of America, hereinafter called defendant, on a contract of yearly renewable term insurance in the sum of $10,000. The Complaint (R. 2-6) alleged maturity of the contract by total permanent disability on July 30, 1919, as a result of "certain diseases and disabilities" contracted and "injuries" suffered by plaintiff during his military service.

The Answer (R. 8-9) joined issue on the allegation of total permanent disability within the life of the policy. The case came on for jury trial on October 29, 1934.

Though plaintiff testified that during his period of service covering nearly two years, he suffered for various short periods from nausea, mumps, and the effects of poison gas and influenza, these statements were not corroborated by his service records. Plaintiff, himself, stated that he performed duty regularly except for four or five days when he had influenza. When discharged from service he listed as his only disability defective hearing in one ear and certified that he knew of no other injury or disease from which he was suffering. Comparable certification as to plaintiff's health was made by his immediate commanding officer and an examining physician. Upon leaving the service he returned directly to his prewar occupation of farming on a tract of over 400 acres, and, with the exception of digitalis taken upon the advice of a druggist for eighteen months prior to June, 1922, and an operation for appendicitis in the summer of 1922, he sought no medical attention until the spring of 1923. Witnesses for plaintiff testified that until 1922, he did seeding and disking on the farm, repaired machinery, cooked, and hauled grain to and from town, but in their opinion he had done no "manual labor," and that after 1922 he had done no work. Plaintiff testified, however, that from 1922 until 1933, the farming activities had been done by hired help under his "supervision" (R. 57, 59, 126); that his crops had been better than those of any of his neighbors, and

that his production had been fair except during 1932 and 1933, in each of which years he harvested only about 850 bushels of wheat. He produced 5300 bushels in 1923, and between that date and 1930, he made bank deposits of over $22,000.

A detailed summary of the evidence is set out hereinafter at pages 11 to 17.

During the course of the trial one of plaintiff's experts was permitted, over timely objection and exception, to express an opinion that plaintiff had been totally permanently disabled from the date of his discharge. (R. 194-195.) At the close of all of the evidence defendant moved for a directed verdict on the ground that there was no substantial evidence that plaintiff became totally permanently disabled while his policy was in force and to the Court's denial of this motion an exception was duly noted. (R. 263-264.) Thereafter, verdict (R. 285) and judgment (R. 11-13) for the plaintiff were entered, awarding disability benefits from July 30, 1919. Defendant's petition for appeal (R. 327) and assignment of errors (R. 290-326) were duly filed and appeal allowed. (R. 329.)

QUESTIONS PRESENTED.

I.

Whether the Court erred in permitting plaintiff's expert witness to express an opinion that plaintiff was totally permanently disabled on July 30, 1919.

II.

Whether there was any substantial evidence that

plaintiff was totally permanently disabled on July 30, 1919.

ASSIGNMENT OF ERRORS.

Defendant relies upon six of its assigned errors as follows:

VII.

The Court erred in overruling defendant's objection to the following question asked of the witness, Dr. Alred, by counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted:

Q. (Facts assumed (R. 300-307) omitted here.) * * * state whether or not the plaintiff, Carl Noble, was or was not in your opinion totally and permanently disabled on the date of his discharge from the army, July 30, 1919.

MR. BALDWIN: We object to that as incompetent, irrelevant and immaterial, and not justified by the record in this case, and as being an improper statement as to what constitutes permanent and total disability. Permanent and total disability at law means this, and this only: any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. That the supposed definition of total and permanent disability read by counsel into the question is used in the argument of the Supreme Court of the United States, and not from the statement of any definite rule.

On the further ground that there are included in the question matters not shown by any proof in the case, and there are omitted from the question material matters which might reasonably change the

conclusion of the expert, if stated to him, which do appear from the records in this case.

THE COURT: Overrule the objection.

MR. BALDWIN: I will ask an exception.

A. Taking those as facts and your definition, he was undoubtedly totally and permanently disabled at the time of discharge. He was undoubtedly totally and permanently disabled if those be true facts in following your definition.

Q. And at what time ?

A. At the time of discharge. (R. 300-308.)

XI.

The Court erred in overruling the motion made by the defendant at the close of all the evidence for a directed verdict in its favor, to which action of the Court defendant then and there duly excepted as follows:

MR. BALDWIN: The defendant now moves that the Court direct a verdict in its favor on the grounds stated on its motion for a directed verdict made at the conclusion of the plaintiff's case. I assume that the record may likewise show that the grounds stated then are as given, and not reported.

MR. MOLUMBY: Yes, it is so stipulated.

MR. BALDWIN: And I wish to add to that, that plaintiff has wholly failed to prove a total disability, or a permanent disability within the time fixed by his pleadings in this case. On the further ground that the evidence in this case is insufficient to and does not tend to prove the necessary allegations of the pleadings. And on an added ground that it appears that the claim made relates to a period later than, and entirely without the limits fixed by the plaintiff's case.

THE COURT: The motion will be denied.

MR. BALDWIN: I ask an exception at this time to each of the rulings of the Court. The ruling denying the motion to dismiss, and the ruling

denying the motion for a directed verdict, and we would like ninety days from today, by an order entered on the minutes, within which to prepare, serve and file our Bill of Exceptions. (R. 311-312.)

XII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 1, as follows:

"Defendant's requested instruction No. 1. You are instructed to find your verdict for the defendant in this case."

To which action of the Court defendant then and there duly objected and excepted as follows:

MR. BALDWIN: The defendant objects and excepts to the refusal of the court to give its requested instruction No. 1. (R. 312.)

XXIV.

The evidence is insufficient to justify the verdict. (R. 325.)

XXVII.

When measured by the rules of law as stated by the Court in its charge to the jury the evidence in this case does not justify and is insufficient to support the verdict rendered in this case. (R. 325.)

XXX.

The Court erred in refusing to enter judgment in favor of the defendant as requested by it at the close of the testimony, to which action of the Court defendant duly excepted. (R. 326.)

PERTINENT STATUTES AND REGULATIONS.

The contract sued upon was issued pursuant to the provisions of the War Risk Insurance Act and insured against death or total permanent disability (40 Stat. 409).

Section 13 of the War Risk Insurance Act (40 Stat. 555) provided that the Director of the Bureau of War Risk Insurance—

> shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act necessary or appropriate to carry out its purposes, * * *

Pursuant to this authority there was promulgated on March 9, 1918, Treasury Decision No. 20, reading:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

POINTS AND AUTHORITIES.

I.

The Court erred in permitting plaintiff's expert to express an opinion that plaintiff became totally permanently disabled on July 30, 1919.

United States v. *White* (C. C. A. 9th) decided May 20, 1935;

United States v. *Spaulding*, 293 U. S. 499;

United States v. *Stephens*, 73 F. (2d) 695 (C. C. A. 9th);

United States v. *Sullivan*, 74 F. (2d) 799 (C. C. A. 9th);

Harris v. *United States*, 70 F. (2d) 889 (C. C. A. 4th);

United States v. *Provost*, 75 F. (2d) 190 (C. C. A. 5th);

Hamilton v. *United States,* 73 F. (2d) 357 (C. C. A. 5th);
Gray v. *United States,* 76 F. (2d) 233 (C. C. A. 8th);
United States v. *Steadman,* 73 F. (2d) 706 (C. C. A. 10th).

II.

There was no substantial evidence that plaintiff became totally permanently disabled on July 30, 1919.

A.

Plaintiff did not meet the requisite burden of showing by positive, non-speculative evidence that during the life of his contract he became both totally and permanently disabled to pursue any substantially gainful occupation.

Lumbra v. *United States,* 290 U. S. 551;
United States v. *Baker,* 73 F. (2d) 691 (C. C. A. 9th);
Deadrich v. *United States* 74 F. (2d) 619 (C. C. A. 9th);
United States v. *Jones,* 74 F. (2d) 986 (C. C. A. 5th);
United States v. *Krueger,* (C. C. A. 7th) decided April 2, 1935;
United States v. *Mintz,* 73 F. (2d) 457 (C. C. A. 5th).

B.

The allegation of total permanent disability is conclusively refuted by

(1) Plaintiff's continuous pursuit of a substantially gainful occupation.

United States v. *Luckinbill,* 65 F. (2d) 1000 (C. C. A. 10th);

United States v. *Steadman,* 73 F. (2d) 706 (C. C. A. 10th);
United States v. *Green,* 69 F. (2d) 921 (C. C. A. 8th);
United States v. *Jones,* 73 F. (2d) 376 (C. C. A. 5th);
United States v. *Burns,* 69 F. (2d) 636 (C. C. A. 5th).

(2) The fact that for a period of more than ten years the plaintiff, with the advice and co-operation of other of his relatives and friends, pursued a general course of life entirely inconsistent with the existence of total permanent disability from the date of his discharge.

Lumbra v. *United States, supra*;
United States v. *Spaulding, supra*;
Miller v. *United States,* Supreme Court, decided March 4, 1935;
Deadrich v. *United States, supra*;
United States v. *Baker, supra*;
Harrison v. *United States,* 42 F. (2d) 736 (C. C. A. 10th);
United States v. *Adcock,* 69 F. (2d) 959 (C. C. A. 6th);
United States v. *Russian,* 73 F. (2d) 363 (C. C. A. 3rd).

ARGUMENT.

I.

THE COURT ERRED IN PERMITTING THE PLAINTIFF'S EXPERT TO EXPRESS AN OPINION THAT PLAINTIFF BECAME TOTALLY PERMANENTLY DISABLED ON JULY 30, 1919.

It has become well established that an expert should

not be permitted to express an opinion upon the exact point for jury determination, and with specific reference to war risk insurance suits "the experts ought not to have been asked or allowed to state their conclusions on the whole case."

United States v. *Spaulding, supra.*

This principle has been recognized and applied by this court in the case of *United States* v. *White, supra,* wherein, though such an opinion was admitted in evidence, no objection was made thereto and the admission of said opinion was not assigned as error. This Court stated that

> However, in view of recent ruling of this and other courts (*United States* v. *Stephens* (C. C. A. 9), 73 F. (2d) 695, and cases cited; *United States* v. *Sullivan* (C. C. A. 9), 74 F. (2d) 799; *United States* v. *Buege* (C. C. A. 9), 74 F. (2d) 1021; *United States* v. *Provost* (C. C. A. 5), 75 F. (2d) 190; *United States* v. *Spaulding,* 293 U. S. 499. 55 S. Ct. 273, 79 L. Ed.....), that it is error to allow medical experts to state their opinions as to the total and permanent disability of an insured in an action on a war risk insurance policy for the reason that such testimony invades the province of the jury to determine for itself the ultimate and controlling issue of permanent and total disability, we must treat the admission of such evidence in this case as a plain error not assigned.

Additional authorities have been cited heretofore in support of this proposition.

It seems apparent that Dr. Alred should not have been permitted to express an opinion that plaintiff was totally and permanently disabled on July 30, 1919, and

that the admission of such opinion constitutes reversible error, particularly in view of the fact that timely objection and exception were noted and the question preserved by appropriate assignment of error.

II.

THERE IS NO SUBSTANTIAL EVIDENCE THAT PLAINTIFF BECAME TOTALLY PERMANENTLY DISABLED ON JULY 30, 1919.

Review of the record will not only reveal an absence of any positive, non-speculative evidence of the alleged total permanent disability, but will also reveal that for more than ten years plaintiff pursued a substantially gainful occupation and a general course of living which conclusively refute such an allegation.

SUMMARY OF THE EVIDENCE.

At the age of twenty-nine (R. 46) plaintiff left his occupation of farming to enlist in the United States Army on September 17, 1917, and remained in the military service until honorably discharged therefrom on July 30, 1919. (R. 62.) Lay testimony for the plaintiff that he had been physically strong prior to service (R. 147) was corroborated by the reports of physical examinations for enlistment. (R. 214-215.) Other lay evidence for the plaintiff, consisting primarily of his own testimony, was to the effect that while en route from the place of his enlistment in the State of Washington to Camp Green, North Carolina, he experienced a few days of nausea, diarrhea, and vomitting (R. 34); that at Camp Green he had the mumps that "went down" (R. 38, 67-68); that after a short stay at Camp

Green he was sent to Hoboken, New Jersey, from whence he embarked for France; that he was sick during the voyage (R. 40); that though he had a gas mask he did not use it and was gassed twice while in France (R. 42-43, 69); that on one occasion a bomb exploded near him destroying part of the wagon on which he was riding and causing the horses to run away, as a result of which, however, plaintiff suffered no physical injury (R. 70); that he had influenza in December, 1918, while in Germany with the Army of Occupation (R. 44, 71); and that he appeared to be nervous while he was in France. (R. 72, 110.) Plaintiff testified that he repeatedly reported his illnesses, particularly the mumps, to army medical officers, but as they could find nothing wrong with him he was always returned to duty (R. 38, 67, 68) which he performed regularly during his entire period of service (R. 34, 38, 83-85, 117) except for four or five days when he was confined to his bed because of influenza. (R. 44.) The records of the Adjutant General's office reveal no sickness or injury suffered by the plaintiff during his period of service, with the exception of slight deafness in one ear noted at the time of discharge. (R. 62-63, 208-220).

Though plaintiff testified that after his attack of influenza he was short of breath and became fatigued quickly (R. 45) he signed a statement at the time of his discharge that, excepting the deafness, which he specifically mentioned, he knew of no injury or disease from which he was suffering. (R. 216.) His immediate commanding officer (R. 218) and a physician who

examined him (R. 217) certified to the same effect concerning the plaintiff's health.

Plaintiff and other lay witnesses testified that when he returned home in the summer of 1919, he was nervous and short of breath, pale and erratic in the movement of his hands. (R. 47, 118-120, 123, 128.) There was also lay testimony that during service plaintiff's hair had turned completely white (R. 150) and that when he returned home the veins in his neck would sometimes throb. (R. 45.) However, he immediately reengaged in his prewar occupation of farming and commenced actively to assist with the farm work. (R. 53.)

The farm consisted of approximately 860 acres, 400 of which were owned by plaintiff, the balance being owned by plaintiff's brother with whom plaintiff farmed on a partnership basis. About 320 acres of the land were under cultivation and fourteen or fifteen head of cattle were kept on the farm. (R. 56.) One of plaintiff's witnesses testified that such a farm usually requires the help of more than one man and sometimes as many as six men. (R. 90-92.) In 1921 the plaintiff and his brother dissolved their partnership and plaintiff assumed the responsibility of operating his own farm. (R. 51.) Though the work was practically done in the fall of 1919 (R. 174) plaintiff did some plowing which caused his muscles to become temporarily contracted and occasioned "restless nights and troubled dreams." (R. 47.) With reference to the spring of 1920 the following is quoted from plaintiff's testimony:

Q. What work were you able to do that spring, if any?

A. I done plowing and seeding, but no manual work. He (plaintiff's brother) done the heavy work.

Q. Were you able to do the heavy work?

A. I was sick that spring and I didn't get started until two weeks after he was working.

Q. How often would your work be interrupted by sickness that spring?

A. It wasn't interrupted much after I got started. I had these here pains in my chest and dizzy spells, palpitation, and was weak, and I started to work and quit and rested up again and went at it and after about two weeks I went ahead and we finished putting in the crop. (R. 48.)

It further appears from the lay testimony for plaintiff that in 1920 he was occupied with such work as cooking, bringing in the wood, milking the cows, repairing equipment which the hired man or brother could not repair (R. 75), hauling wheat to town and bringing back groceries and implements (R. 92), and seeding and disking. (R. 175.) It was also a part of plaintiff's evidence that in the spring of 1922 he "did some of the work toward putting in the crop" though "he was sick in the spring and laid off some," (R. 178), but that at that time he seeded forty or fifty acres of land. (R. 53.)

Prior to service plaintiff handled his farm alone because he had neither teams nor machinery with which hired help could work. (R. 50-51.) After service he had both horses and equipment sufficient for two complete outfits and could therefore employ additional help.

(R. 58.) In 1921, he reduced his cultivated acreage by half, but produced a larger crop with less work because of an improved system of farming. (R. 53.) Plaintiff testified that since 1922 he had helped some around the house but had done no farm work. (R. 53.) From that date until the spring of 1933, he continued to live on his farm and has had the work done under his "supervision," (R. 57) he "directing the operations." (R. 59.) Plaintiff further testified that until about 1930, his average production was "away ahead" of that of his neighbors (R. 59), and that in 1923 he had produced 5300 bushels of wheat which was worth $1 per bushel. (R. 57.) He stated that his crops had been fair except for the last two years (1932 and 1933) in each of which he had harvested only about 850 bushels. (R. 57.) After 1920 plaintiff purchased approximately 250 additional acres of land (R. 58) and for the seven-year period from 1923 to 1930 his account in one bank showed deposits of $22,081.23. (R. 261.)

In 1928 plaintiff was married to a trained nurse who had attended him in a professional capacity and was fully aware of the state of his health. (R. 165.)

Several of plaintiff's lay witnesses expressed opinions that since discharge he had continued to get worse. (R. 73-74, 125, 129-130.) Plaintiff consulted no doctor until June, 1922, (R. 60) though for eighteen months prior thereto he had been taking digitalis upon the advice of a druggist (R. 119, 120) and medical attention was sought at that time only because the druggist though plaintiff had appendicitis. (R. 60.) Though

the record does not show definitely the diagnosis or treatment in June, 1922, it may fairly be inferred that the treatment consisted of an operation for appendicitis. (R. 55, 186.) It appears that plaintiff had no further medical examination or treatment until February, 1923, at which time Dr. Porter, who examined him in connection with a claim for compensation (R. 55) found valvular heart disease and considered plaintiff to be very nervous because he (plaintiff) was afraid he was going to die. (R. 25.) Dr. Porter testified to an opinion that at the time of the examination the prognosis was unfavorable; that plaintiff would continue to get worse (R. 29); and that he was totally disabled at the time of the examination. (R. 194.)

Pursuant to the advice of Dr. Porter (R. 55) plaintiff applied to the Government for treatment and spent about six weeks in a Veterans' Bureau hospital at Helena in the spring of 1923. From February, 1924 until about April, 1925 he was in the Aberdeen Hospital at St. Paul, after which he received no hospitalization until the spring of 1931, when he was again under treatment at Helena for about six weeks. Thereafter, he was treated in the hospital for a few weeks in the spring of 1932 and again in 1933. (R. 54.)

Plaintiff testified that in addition to the above he had received treatment from Dr. Attix and Dr. Wallin, but the time, extent and nature of their treatment is not disclosed. (R. 55.)

Dr. Alred testified for plaintiff that he had examined him a few days prior to trial, at which time the follow-

ing diagnosis was made: "anemia, nephritis, chronic; myocarditis, hypertension arterial sclerosis and psychoneurosis; atrophy of the legs from disuse; enlarged prostate." In answer to a long hypothetical question, Dr. Alred was permitted, over defendant's objection and exception, to express an opinion that plaintiff was totally permanently disabled as of July 30, 1919. (R. 194.) This witness further testified that plaintiff's condition as described in the hypothetical question should have been treated in 1919 (R. 228); that the use of digitalis for eighteen months could have affected adversely the nerve control of the heart (R. 227); and that digitalis should be taken only upon advice of a physician who has knowledge of the entire physical condition of the patient. (R. 226.)

ANALYSIS OF THE EVIDENCE.

Taking as literally true all facts testified to on behalf of the plaintiff and disregarding for the moment other evidence which refutes the alleged total permanent disability, he has established only that during the life of his policy he became nervous, short of breath, pale, and erratic in the movements of his hands, and that his hair turned white, as a result of all of which he became partially incapacitated by a disability which may or may not have been permanent. The plaintiff's witnesses testified that he was not able to do the heaviest of the farm work. Yet until 1922, he was able to do disking, seeding, cooking, repairing of machinery, milking of cows, and hauling of grain and supplies to and from town, in addition to supervising his farm work generally. This

falls short of showing a total disability even though "he could not work as long each day as he otherwise would in order to perform the work which was available" or even though "he had to rest frequently and work relatively short hours."

United States v. *Baker,* 73 F. (2d) 691, 695 (C. A. 9th).

In fact it has become well established that a disability which merely precludes a person from engaging in strenuous labor or even light labor for long hours is not a total disability.

Lumbra v. *United States,* 290 U. S. 551;
Deadrich v. *United States,* 74 F. (2d) 619 (C. C. A. 9th);
United States v. *Jones,* 74 F. (2d) 986 (C. C. A. 5th);
United States v. *Mintz,* 73 F. (2d) 457 (C. C. A. 5th);
United States v. *Kreuger,* (C. C. A. 7th) decided April 2, 1935.

Furthermore, no attempt was made to show that plaintiff could not have engaged in some occupation other than farming. His policy protected against inability to engage in *any* substantially gainful occupation. (Cf. *Miller* v. *United States,* (Supreme Court) decided March 4, 1935; *United States* v. *Jones,* 73 F. (2d) 376 (C. C. A. 5th).

There is no evidence that any disability, assuming that plaintiff was disabled in July, 1919, was then permanent. Any inference of permanency which might be drawn from the fact that his condition later became both permanent and total is refuted by his failure for

nearly four years to receive competent medical attention,

Eggen v. *United States*, 58 F. (2d) 616 (C. C. A. 8th);

And Cf

Deadrich v. *United States, supra*;

United States v. *Townsend*, 73 F. (2d) 310 (C. C. A. 4th).

and his ill-advised and unregulated taking of digitalis for eighteen months.

In addition to plaintiff's failure to prove his case positively, his allegation of total permanent disability is conclusively refuted.

It appears that until 1933, he was continuously engaged in a substantially gainful occupation, even though he could not do all the work on the farm,

Cf. *United States* v. *Burns*, 69 F. (2d) 636 (C. C. A. 5th);

and

United States v. *Green*, 69 F. (2d) 921 (C. C. A. 8th);

and was assisted with the work by others,

Cf. *United States* v. *Jones*, 73 F. (2d) 376 (C. C. A. 5th);

and even though subsequent to 1922, he was able only, according to his own testimony, to "supervise" the farming activities.

Cf. *United States* v. *Luckinbill*, 65 F. (2d) 1000 (C. C. A. 10th);

and

United States v. *Steadman*, 73 F. (2d) 706 (C. C. A. 10th).

It seems apparent that for some twelve years after the date upon which total permanent disability is now alleged to have arisen neither plaintiff nor his associates thought his condition was serious as of the date of his discharge. His army medical record covering nearly two years showed no disability of any consequence and at the time of his discharge, he, his commanding officer, and examining physician, certified that none existed. Cf. *United States* v. *Baker, supra; Deadrich* v. *United States, supra*; and *Harrison* v. *United States*, 42 F. (2d) 736 (C. C. A. 10th). The correctness of these certifications is strongly supported by the fact that he did not seek medical advice or treatment for the condition now relied upon until 1923, and a druggist who observed him regularly did not advise medical treatment until appendicitis was indicated in 1922. Furthermore, the doctors who treated him in 1922 were neither called to testify nor their absence explained. It does not appear that they advised him to take treatment for any other condition, and it may fairly be inferred that no other disability of consequence was noted at that time.

As late as 1928 he assumed the responsibilities of marriage and rearing a family. What is more, his wife is a trained nurse who had professional knowledge of the state of his health. Cf. *United States* v. *Adcock*, 69 F. (2d) 959 (C. C. A. 6th); *United States* v. *Russian*, 73 F. (2d) 363 (C. C. A. 3rd).

Finally, plaintiff made no claim for benefits under his insurance contract until nearly thirteen years after the date upon which he now alleges total permanent disab-

ility. He offered no explanation for this long delay and this alone is to be taken as strong evidence against the merits of his case.

Lumbra v. United States, supra;
United States v. *Spaulding, supra*;
Miller v. *United States, supra.*

CONCLUSION.

It is respectfully submitted that the trial court erred as heretofore assigned and that the judgment of said court should be reversed.

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United States Attorney.

No. 7776.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

CARL F. NOBLE,

Appellee.

On Appeal from the District Court of the United States for the District of Montana.

BRIEF OF APPELLEE

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BRIEF FOR THE APPELLEE

APPELLANT'S STATEMENT OF CASE CONTROVERTED.

The statement of the case of the Appellant is so unfair, misleading and incomplete that it leads one to believe that the writer of the brief has failed to read the record.

The statement of facts contained in the Appellant's brief would lead one to believe that the Appellee had become slightly nauseated, made sick for only four or five days, and returned to the arduous labor of farmer which he continued to perform until the time of the trial, making large sums of money and raising much wheat; that his farming operations were conducted by hired help through his personal supervision.

It will be noted, however, that counsel fail to refer to the Record to substantiate these statements. The fact is the Record discloses that before the plaintiff

went over-seas, and when first in the army, and while still strong and healthy he was attacked by a period of sickness which caused severe vomiting, diarrhea, and dizziness; that he reported to the infirmary but was compelled to do duty during this period of sickness and his sickness was so obvious that his First Sergeant came around and ordered him taken back to the infirmary and detailed a Corporal to take him there. (R. 44 and 45.) After four or five days of this attack he recovered and then later at Camp Greene had the mumps and had them so severely that they "went down on him" and he had them for four or five days and reported to the infirmary repeatedly but could get no relief until after they had "gone down on him", and this significant fact is overlooked entirely that while this man had the mumps, and while they were "down on him" they compelled him to duty in this weakened condition, compelled him to march and carry a pack weighing some seventy-three pounds on a long two mile march, and this experience knocked him out completely, and he had to go to bed and that he did no duty from then on until he went to France. (R. 35 to 40.) That during this period while he was sick he had to do duty up until the time he left for Camp Merritt and was in bed for two days on the train on the way to Camp Merritt. (R. 39.) On arrival at Camp Merritt he again went to bed and was marked "quarters" by the Doctor upon his arrival. He remained for two more days in bed and was up in quarters doing no duty while they were in quarantine and until they went to France. (R. 39-40.) That he went overseas and was severely gassed and more than that he

was so much over-worked and had gone so long without sleep that there was detailed a special gas guard to prevent him from being killed by gas. (R. 42.) That despite all of this sickness and treatment the man carried on, was severely sick and constantly vomiting for a period of ten days from this first gassing. (R. 42.) Thereafter and while in Luxemburg he had a severe case of influenza. (R. 43.) While in France and as a Wagoner up at the front, working night and day under shell fire he was so persistently devoted to duty that he carried on despite the fact that he was obviously physically unfit for service. While up at the St. Mihiel Front, and on a wagon supplying ammunition to the front, a shell hit under the wagon, blowing it all to pieces and the team dragging him to the bottom of a mountain. (R. 69 and 70, and R. 84.)

It is obvious from the testimony of two men who served with him in the service that the man was completely shell shocked and out of his head a greater portion of the time he was serving at the front. (Testimony of Bullock R. 66 to 105, and Testimony of Hillstrand R. 105 to 117.)

The Record is replete with indications that this man was carring on with his duty long after he ought to have reported back to the hospital and was doing it at a great expense to his health, and counsel for the Appellant make much of the fact that he regularly performed duty despite his sickness. But in the days when the life of an individual seemed pretty cheap to offer as the price of winning battles, they looked upon such sacrifice with a different attitude

as is indicated by the fact that the Appellant, through its proper officers, showed its appreciation of such conduct on the part of the Appellee by decorating him for bravery and citing him for devotion to duty during the St. Mihiel and Argonne offensives. (R. 63.)

QUESTIONS PRESENTED.

As is indicated by the brief of the Appellant, there are but two questions presented by the Assignments of Error, and particularly by the Specifications of Error in the brief. One, that dealing with a hypothetical question propounded to one of the Doctors, and the other question having to do with the sufficiency of the evidence to justify the verdict. Specification VII raises the first question. Specifications XI, XII, XIV, XVII and XXX raise the second question.

ARGUMENT

ABANDONMENT OF ASSIGNMENTS OF ERROR.

Having failed to specify in their brief other Assignments of Error than those noted above, Appellant has abandoned all other assignments. *Rule of the Circuit Court of Appeals Ninth Circuit, Rule 24.*

This rule has been adopted by every Circuit Court of Appeals in the United States and by the United States Supreme Court and has been interpreted on numerous occasions so as to hold this to constitute an abandonment of all assignments not properly set forth as specifications of error in the brief. *Lohman vs. Stockyard Loan Co. 243 Fed. 517; City of Goldfield, Colo. vs.*

Roger 249 Fed. 39; Moline Trust and Savings Bank vs. Wylie, 149 Fed. 734; Van Gunden vs. Iron Co. 52 Fed. 838; U. S. Potash Co. vs. McNutt (CCA 10) 70 Fed. (2nd) 131.

OPINION EVIDENCE

The only error assigned with reference to hypothetical questions or opinion evidence of the Doctors is that specified on page four of Appellant's brief and is Assignment of Error Number VII. It will be noted that the only objection made to the question was that it was irrelevant, incompetent and immaterial, and that it did not state a definition of total permanent disability to the liking of counsel for the Appellant, and that the objection wholly fails to direct the court's attention to any impropriety in the question arising out of the fact that it might be an invasion of the province of the jury. On the contrary the objection, if the trial attorney had in mind that it was erroneous because it was an invasion of the province of the jury, was so designed as to lead the Court into error because the only specific objection to the question was that a definition which he sets forth in his objection of total permanent disability was not given in the question. Further objection was made to the question on the grounds that it did not include more of the evidence. Nowhere is the objection made that the question was an invasion of the province of the jury or that the Doctor was called upon to render an opinion upon a question which the jury would have to decide, and on the contrary, the whole objection would indicate to the Court that that feature, if any existed

in the question, was not objectionable.

Where a general objection is interposed to a question that it is irrelevant, incompetent and immaterial and certain specific objections are also made, it has been uniformly held that the general objection is too general to raise a specific objection and that only such specific objections as are made at the trial below will be considered on appeal. Thus the objection here made is too general to raise the point that the question was objectionable on the grounds that it invaded the province of the jury, nor was this specific objection made. It is likewise uniformly held that where specific objections are made all other specific objections not made are waived. *2 Bancroft Code Practice and Remedies 1840, Section 1368 Crouch vs. National Livestock etc. (Ia.) 217 N. W. 557. Erickson vs. Webber (S. Dak.) 324 N. W. 558 at 559 at 561-562. Clooney vs. Wells (Mo.) 252 S. W. 72. Todd vs. Chicago City Railroad Co. 197 Ill. App. 544. Sterlen vs. Bush (Ia.) 195 N. W. 369 at 372 Texas N. O. R. Ry. vs. Gross (Tex.) 128 S. W. 1173. Southern Ry. vs. Guilat (Ala.) 48 S. W. 472. In re: Huston 163 Cal. 166 124 Pac. 852. Ferrari vs. Beaver Hill Coal Co. 54 Ore. 210 102 Pac. 1016 Phoenix R. Co. vs. Landus 13 Ariz. 80 108 Pac. 247.*

The case of *Crouch vs. National Livestock, etc. supra, (Ia.) 217 N. W. 557*, is directly in point. The following question was propounded to the witness in the court below:

> "What in your opinion would you say caused the death and the injury to the animals described".

The objection of the Appellant was that the ques-

tion was hypothetical, irrelevant, incompetent and immaterial and based upon facts not in the record or at least not founded on a sufficient state of facts in the record. The Court at page 561 after emphatically pointing out that the question was a clear invasion of the province of the jury and was in that respect improper in that it left nothing for the determination of the jury, said:

> "Such a question has been repeatedly condemned by this Court * * * * * but it is contended, however, that the objection to the testimony was insufficient to raise the question now urged. We have recognized as a general rule that the objection that evidence is irrelevant, incompetent and immaterial is not sufficient to raise a specific objection on appeal. We are disposed to hold that the objection as made was too general to raise the question now urged by Appellant."

Another case directly in point is that of *Clooney vs. Wells supra (Mo.) 252 S. W. 72* wherein the Court, discussing an exactly similar situation, said:

> "But aside from all this the only objection to the testimony below was 'I will object to this as calling for a conclusion'. The objection now urged is that it invaded the province of the jury. No such objection was made on the trial. Parties cannot shift their position. As no objection was made on the trial it was waived and cannot be urged now." *(Citing Gaty vs. United Rys. Co. 227 S. W. 1041)* "wherein the court said on page 1046 'additional objections are now urged but as they were not made at the time the evidence was received they were waived and cannot be considered'."

HYPOTHETICAL QUESTION NOT OBJECTIONABLE ON ANY GROUNDS STATED IN OBJECTION.

A mere casual review of the record herein and of the hypothetical question propounded shows that the question propounded was not in any way objectionable on any of the grounds stated in the objection of counsel. Indeed, that is so true that counsel for Appellant in their brief do not even intimate that it was objectionable upon any of the grounds stated in the objection, but insist that it was objectionable because it invaded the province of the jury and intimate that special rules of evidence are applicable to war risk insurance cases in the following language:

> "It has become well established that an expert should not be permitted to express an opinion upon the exact point for jury determination and with specific reference to war risk insurance suits 'the experts ought not to have been asked or allowed to state their conclusions on the whole case.'" (Appellant's brief pp. 9 and 10.)

RULING IN THE CASE OF *United States vs. White 77 Fed. (2nd) 757.*

It is true that this court in an opinion rendered May 20th, 1935 in the case of *United States vs. White 77 Fed. (2nd) 757* reversed and remanded for a new trial a cause because there was propounded to two doctors a hypothetical question calling for their opinion as to whether the insured was totally and permanently disabled at the time of his discharge even though no objection was made to the question in the lower court and no assignment of error was predicated

thereon and this court assigned as authority for their holding in that respect Rule 11 of this court.

We respectfully submit that there is nothing in Rule 11 to do more than to authorize this court to ignore the failure of Appellant to make an assignment of error and that there is nothing whatever in said rule authorizing this court to take cognizance of an objection raised for the first time on appeal or to obviate the necessity of an Appellant making a proper objection in the lower court procuring the ruling thereon and noting an exception thereto.

If no objection was made in the lower court, we respectfully submit that the lower court could not be in error because the lower court made no ruling that could be considered erroneous. Before an error can be plain or exist at all there must have been some act to constitute the error. To say that a trial court must watch the record in the trial of a law suit and permit no improper evidence to go in regardless of whether objections are made or not, is to say that it is the duty of the lower court to try the cause as counsel for both sides.

To follow the White decision is to do away entirely with the necessity of making objections or noting exceptions or assignments of error or specifications of error. Surely this cannot be the intention of this court. It occurs to counsel for the Appellee that there must have been something in the record of the case of United States vs. White which necessitated sending that cause back for a new trial and that it was the intention of this court to point out to the lower court for the purpose of a new trial error committed in

order that it might not be committed upon the retrial. However, if the intention of this court was as it appears from the face of the opinion in the case of United States vs. White, supra, then it is contrary to all of the decisions available to counsel for Appellee.

THIS IS AN ACTION AT LAW

Contrary to the inference contained in the quotation from the brief of the counsel for the appellant that special rules should apply to war risk insurance cases, it has been decided by the Supreme Court of the United States on several occasions that an action on a War Risk Insurance policy is a plain and simple action at law and the same has likewise been decided by this court. *United States vs. Fitch 256 U. S. 547 65 L. Ed. 1084 41 Sup. Ct. Rep. 568. United States vs. McGovern 299 Fed. 302 affirming 294 Fed. 108, writ of error dismissed, 45 S. Ct. 351 267 U. S. 608 69 L. Ed. 812. Law vs. United States 266 U. S. 494 45 S. Ct. 175 69 L. Ed. 401 reversing (C.C.A. 1924) 299 Fed. 61 which reversed (D.C. 1923) 290 Fed. 972. Crouch vs. United States 266 U. S. 180 69 L. Ed. 233 45 Sup. Ct. Rep. 71.*

As Mr. Justice Brandeis said in the case of *Law vs. United States, supra, 266 U. S. 494 45 S. Ct. 175 69 L. Ed. 401:*

> "This is an action at law, brought in the Federal court for Montana, on a contract for insurance issued under the War Risk Insurance Act * * * * *.
>
> "The jurisdiction possessed was that to be exercised in accordance with the laws governing the usual procedure of the court in actions at law for money compensation."

Under "the usual procedure of the court in actions at law for money compensation" an Appellate court never takes cognizance of an objection raised for the first time on an appeal and will not hold the lower court in error when that tribunal was not called upon to make a ruling by which it could get into error. *Hanna vs. Maas 122 U. S. 24 7 S. Ct. 1055 30 L. Ed. 1117. Turner vs. Yates 16 How. (U. S.) 14 14 L. Ed. 824. Springfield F. & M. Ins. Co. vs. Sea 21 Wall (U. S.) 158 22 L. Ed. 511. New Orleans, O. & G. W. R. Co. vs. Lindsay 4 Wall 650 71 U. S. 243 18 L. Ed. 328. Mechanics Bank of Alexandria vs. Seaton 1 Pet. 299 7 L. Ed. 152. Hoyt vs. U. S. 10 How. 109 13 L. Ed. 348. Downey vs. Hicks 14 How. 240 14 L. Ed. 404. U. S. vs. Moreno 1 Wall 400 17 L. Ed. 633. Pomeroy vs. State Bank of Indiana 1 Wall 592 17 L. Ed. 638. Schuchardt vs. Allen 1 Wall 359 17 L. Ed. 642. Cavanzos vs. Trevino 6 Wall 773 18 L. Ed. 813. Williams vs. Kirtland 13 Wall 306 20 L. Ed. 683. Stebbins vs. Duncan 108 U. S. 32 2 Sup. Ct. Rep. 313 27 L. Ed. 641. Burley vs. German American Bank 111 U. S. 216 4 Sup. Ct. Rep. 341 28 L. Ed. 406. Belk vs. Meagher 104 U. S. 279 26 L. Ed. 735. Holmes vs. Goldsmith & Co. 147 U. S. 150 13 S. Ct. Rep. 288 37 L. Ed. 118. Herencia vs. Guzman 219 U. S. 44 31 Sup. Ct. Rep. 135 55 L. Ed. 81. Hoyt. vs. Hamburg 128 U. S. 584 9 S. Ct. 176 32 L. Ed. 565. Stoddard vs. Chambers 2 How. 284 11 L. Ed. 269. Renner vs. Columbia Bank 9 Wheat 581 6 L. Ed. 166.*

In all of the above cited cases the Supreme Court

since the very earliest times and on down to the present day has followed the old well established rule that nothing which occurs in the progress of the trial below can be assigned as error in the Appellate court which was not called to the attention of the court below and decided by it and when specific objections are made to the admission of evidence the court has a right to assume that all others are waived and proceed with the case accordingly.

There are literally thousands of federal and state court cases announcing the same rule. Corpus Juris states the rule as follows:

> "Objections to the admission of evidence cannot be raised for the first time on appeal and the rule is applicable whatever may be the grounds which render the evidence inadmissible." *3 C. J. 806.*

and to this rule they actually cite thousands of cases.

The rule applies as well to the reception of opinion evidence and the allowance of hypothetical questions. *Herencia vs. Guzman 219 U. S. 44 31 Sup. Ct. 135 55 L. Ed. 81. Wabash Screen Door Co. vs. Black 126 Fed. 721. Sigafus vs. Porter 841 Fed. 430.*

EVIDENCE AMPLY SUSTAINS THE VERDICT.

All of the assignments of error other than the assignment heretofore discussed and predicated upon opinion evidence are based upon the assertion that the evidence does not justify the verdict.

Appellee enlisted September 20th, 1917 and was discharged July 30th, 1919. (R. p. 61-62). Shortly after enlisting and while on his way from Camp Gettysburg to Camp Green he became sick, was nauseated, vomited and had diarrhea and was dizzy.

Upon arrival the first night he vomited all night and had to go to the latrine several times and went on sick report the next morning but was marked "duty" and went out and attempted to do "duty" but had to drop out of formation and sit down. His drill sergeant ordered him back in line and the first sergeant overruled him and appointed a corporal and a private to take him over to the infirmary and he was taken to the infirmary but again marked "duty". He went out the next morning and kept on trying to do "duty" as a soldier and after a few days he became better. He made two or three more trips to the infirmary. He was sick for three or four days. (R. p. 34-35.) Thereafter and while at Camp Green he got the mumps and reported to the infirmary. The doctor said there was nothing wrong with him and sent him back to "duty" in the morning but he returned again to the infirmary in the afternoon and was again examined and again marked "duty", and given castor oil. He went back to "duty" but was feeling so sick he was unable to do "duty". (R. p. 36.-37.) The next morning the mumps had gone down on him and he reported back to the infirmary and the doctor admitted that he had had mumps but stated that he was over them and marked him "duty". His condition at that time is described by a buddy who was with him and who did a portion of his work while he had the mumps (R. p. 66) as follows:

> "I observed with reference to his mumps after that that he was swollen at the neck, and he was swollen at the groin, below. We were in the same Camp together. As to what I observed with refer-

ence to his testicles, they were swollen up. As to what occurred with reference to any treatment of the mumps, he went over to the infirmary on a sick call, and they marked him 'duty'." (R. p. 67.)

And again:

"I stated that Carl walked straddle legged and that he had a swelling in his neck, and he had a swelling in his groin and that his testicles were swollen. * * * * * I did see a medical officer in that infirmary make an examination of his groin or testicles; that was at the time I reported at the infirmary with him, some time in April * * * * * A medical officer asked him if he had been injured. * * * * * The medical major said that he had had the mumps but that he was then over them." (R. pp. 82 and 83.)

While in this condition he was compelled to do duty and was compelled to carry his entire equipment about two miles on a march when they entrained for Camp Merritt. (R. p. 38.) His pack and equipment weighed 73 pounds. (R. p. 39.) Thereafter he was sick on the train for two days and laid on his bunk all the time. (R. p. 39.) Immediately upon arrival at Camp Merritt he went to the barracks and went to bed and on an inspection the next morning by a doctor he was marked "quarters" and remained in bed for another two days and remained in "quarters" until he went to Hoboken to go overseas. (R. p. 40.) Thereafter and while at St. Mihiel sector on the 14th of September, he was gassed. He had been out over 48 hours and was very near to exhaustion, so much so that they detailed a special guard to watch him to see that he had his respirator on properly and the next day after being gassed he began vomiting, was sick and had diarrhea and remained sick and had a sore chest for more than a week or ten days.

(R. p. 42.) Later and again while up in the Argonne he was gassed several times in the middle of October and continued vomiting frequently for several days thereafter and had the diarrhea continuously from then on until after the Armistice. (R. pp. 42-43.) While in the Argonne and while driving a supply wagon a shell hit under the wagon cutting the brake rod and dug a big hole in the road, tore parts of the wagon off, the shell going through the side part and the end-gate in the wagon and blew off part of the end-gate and the team went to the bottom of the mountain and the Appellee was mixed up with the rations at the bottom of the mountain. (R. p. 70.) The witness who saw the transaction stated that he did not see the Appellee for four or five days thereafter and described his condition five days thereafter as follows:

> "I said I didn't see him again for about five days. As to his condition when I saw him after that. He was up. If you would ask him anything he would flutter, his hands would go, he would stutter, and at numerous times I would ask him for rations, when we were dishing out rations his hand would shake like that (Indicating), and he would stutter, hands shake, and looked like a man that was about twenty years older. Prior to this occurrence Carl did not stutter that I know of." (R. p. 70.)

After the Armistice and while up in Luxemburg the Appellee had an attack of influenza and was laid up for four or five days with the flu. (R. pp. 43-44.) Another buddy who served with him overseas and time he was under actual shell fire when they were who saw him frequently described the periods of

up for the first time at Chateau Thierry for 39 days, Sandy A sector for 39 days and St. Mihiel sector for 10 days. This witness described the condition of the Appellee while up at the front as that of an evident shell shock and said:

"As I remember Noble he was always riding a mule, and he was a man of a highly nervous disposition, that is, he was in the Argonne." (R. p. 109.)

"I will describe how he appeared up there and how he acted. He acted like if it was too much of a nervous strain for him. He was shell shocked in our opinion. (R. p. 110.)

"When I saw him he was sitting on that mule. He was always yelling at the men, and spitting all over himself. He would get so excited he was wild. He would curse anybody that would interfere with his work, I presume. I have seen him curse officers, which he could get court martialed for. He was a likable fellow. He would have cursed General Pershing. His main purpose was to get those wagons up there whether it killed him." (R. p. 111.)

"He was practically gray haired then. As to whether it was that way when I first saw him in November, I will say it was a dark brown." (R. p. 111.)

When coming home on the boat immediately prior to his discharge this witness described his condition as follows:

"It was generally the same as he was in the war in the Argonne. He was nervous and awfully temperamental, and he stuttered a lot. He was nerve racked; he did not have any nerves. He looked a lot older. In fact we considered him the old man when we came home." * * * * * "That was the condition he was in when he was discharged." R. pp. 115-116.)

In addition to this the Appellee described his condition just before discharge as follows:

> "I was rather nervous, soft, couldn't stand much exertion. In fact I hadn't been doing a great deal of exertion. I was short of breath and the veins in my neck would throb and my ears would throb and I would have palpitation." (R. p. 45.)

Immediately upon coming home he attempted to do some work plowing, concerning which he testified:

> "I was plowing and would find myself rigid and stiff on the plow. I would relax and before I would go thirty rods I would be the same condition, just as tight as a fiddle string." (R. p. 47.)

Speaking of his work he said:

> "It would be interrupted by sleepless nights. My heart would get to palpitating and the bed would shake, and when I wouldn't work I wasn't troubled much. * * * * * I would be restless and my heart would pound and I could feel the bed shake. After I had gone to sleep I would have these nightmares, troubled dreams. Most of them were connected up with hearing men hollering. These fellows had liquid fire on them and were hollering. I would want the fire put out. I imagined I had it on myself sometime." (R. p. 49.)

This is the condition the man was in when discharged from the army and prior to his discharge. Surely a condition of total disability which his subsequent history shows remained with him permanently. The testimony of each and every witness both medical and lay shows that this condition existed at all subsequent times. Palpitations of the heart so positively described is shown by the testimony of Dr. Allred to be an indication that he had myocarditis at that time. (R. p. 202.)

The testimony of Dr. E. S. Porter as to his ex-

amination made of him as early as February 1923 indicates that his heart trouble existed then and that its principal manifestation was the palpitations and shortness of breath that the man described as having before his discharge from the army. Dr. Porter said:

> "The heart was unable to respond to ordinary exertion in the normal manner. That is, ordinary exertion would bring on this pain and shortness of breath and palpitation, weakness. I think I diagnosed his case at that time as valvular heart disease." (R. p. 25.)

The manner in which these disabilities have affected the Appellee, preventing him from doing any work since his discharge from the army are graphically set forth in the testimony.

WORK RECORD INCONSEQUENTIAL.

Much is made by counsel for Appellant of what they term "the work record of Appellee" after his return from the army. Naturally one who so persistently "stuck to his guns" under adverse conditions despite sickness and physical handicaps as to attract the attention of his superior officers to the extent that they cited him for devotion to duty (R. p. 63) cannot be expected to come home and lay down without making an effort to get by despite the physical handicaps that he brought home with him. This man came home and attempted to carry on but very soon found that he could not do so. To fairly appraise the situation one must take into consideration the situation under which the Appellee's testimony was given. His testimony was taken by way of deposition some sixteen months before the trial (R.

p. 30) and he remained in such precarious condition that at the time of trial he was unable to be there, (R. p. 29) so that it was impossible for him to take the stand to refute certain inferences sought to be drawn from evidence introduced. This man owned a large farm before he went into the army which his brother was farming during his absence. (R. p. 48.) Counsel for Appellant states that upon his return from the army in the year 1919 he began doing work plowing and seeding. Obviously this is incorrect. He didn't get out of the army until July 30th, 1919 (R. p. 62.) At that time the spring plowing and seeding would have all been done. Nothing remained to be done except harvesting the crop that had previously been put in by his brother. It is true that the testimony of the Appellee (R. pp. 47-48) might give one a wrong impression unless carefully read but at the bottom of the page it is shown conclusively that he was speaking of the spring of 1920 rather than 1919 and that upon his arrival home from the army the harvesting was practically all done, (R. p. 49) and it was in that fall that he attempted to do some plowing but his heart woud get to palpitating and he had sleepless nights. When he didn't work he wasn't troubled and when he did work he would be restless. His heart would pound and he could feel the bed shake. He had nightmares and troubled dreams most of which were connected up with hearing men hollering because they had liquid fire on them. He would be trying to put out the fire and imagined that he had the fire on himself. (R. p. 49.) The next spring his brother again put in the crop but the Appellee himself was

unable to be of any help as the same condition prevailed that had prevailed previously. (R. p. 40.) The fact is that most of the work was done prior to the time Carl got back from the army. That is, all of the summer fallowing was done prior to his return from the army. Nothing was left to be done except the seeding. (R. p. 175.) His brother testified:

> "As to whether I had any help to put that crop in that spring, I put that crop in practically all myself. Carl did not do anything towards putting in the crop other than what I have already testified to." (R. p. 176.)

The testimony to which he referred was to the effect that Carl attempted to drive the team some in harrowing but that he could stand it only for a while and then would have to quit and would lay off. That he might work a day at a time some of the time and maybe couldn't work a full day. If he worked longer than a day he would be completely worn out. (R. p. 175.) Then as to the summer fallowing that was done in 1920, the brother did all of the summer fallowing. Carl did none of the work of summer fallowing that fall. (R. p. 177.) In the spring of 1921 there was some spring wheat to be planted. It took about two days to plant it. Carl started it and worked about a half day and had to quit and his brother finished it up. (R. p. 177.) In the summer of 1921 his brother and Bert Ingram did what summer fallowing was done and the seeding was done by Bert Ingram and in the spring of 1922 what spring wheat was seeded was put in by his brother and another man. (R. pp. 178-179.) In 1922 in the

spring he did do some work but he got sick and had to lay off according to his brother's testimony (R. p. 179) and the result was that from that time on he never again attempted to do any work (R. p. 53). It will be noted from the testimony that the farming operations on the Appellee's farm never paid during any of the time that he was attempting to do any work or have anything to do with the work, (R. pp. 48-58) and that it was only in the year 1923 after he quit attempting to do anything that the ranch showed any appreciable return. (R. p. 57.) At that time it will be remembered he had been to Dr. Larson for treatment in June, 1922 and July, 1922, (R. p. 60) and in January or February of 1923 consulted Dr. Porter of Lewistown (R. p. 61) and was by him sent to the hospital in Helena for treatment (R. p. 24) and was there for at least six weeks (R. p. 54) during all of the time that the spring wheat crop was being planted, he getting out of the hospital in May or June of 1923 (R. p. 54) and at the end of the year was in such physical shape that he was sent to the St. Paul Hospital and remained there for thirteen or fourteen months. (R. p. 54.) Thus we see that the only time when the ranch showed a profit he was in the hospital and in no physical condition to do anything. The testimony is clear that he attempted to do nothing whatever after the year 1922. (R. p. 53.) Certainly it cannot be said simply because a man owned a ranch before he went into the army that it is impossible for him to become totally and permanently disabled if he turns the ranch over to someone else and they pay him as rental a

portion of the crop while he is lying flat on his back. But that is exactly what would have to be decided to hold that the work record of the Appellee negatives the fact that he was totally and permanently disabled.

There is not the slightest iota of evidence offered by the Appellant to contradict any of this testimony and a half dozen or more witnesses were called by the Appellee who corroborated him in every detail in this respect. The only evidence offered by the Government in refutation of any of the Appellee's case was a bank account which in the first place wasn't even shown to be the bank account of Appellee (R. p. 261) and showed only the total deposits made over a period of years by someone in this account. There wasn't any evidence offered whatever to show that if the bank account was that of the Appellee that any of the money was derived from any occupation that he was engaged in, or was the result of any services that he had performed or anything in the world to connect the bank account or the deposits made therein with the Appellee. As pointed out above the Appellee was in such physical condition at the time of the trial he could not take the stand to testify. It is as reasonable to suppose that all of the funds therein deposited were the result of an inheritance or some other source as it is to suppose that they came from the result of labor. As a matter of fact the record shows that he was compelled to dispose of a good deal of the property that he had prior to his enlistment in the army. For instance he had to sell all of his cattle because he didn't feel able to take care of them. (R. p. 58) also some eight or ten head of

horses. (R. p. 59.) The jury undoubtedly gave this evidence just what weight it deserved—absolutely nothing. To say that a man who has $50,000 in the bank can't become totally and permanently disabled is to say something that on the face of it is not true, or to assume that a person who has deposited some $20,000 in the bank in the course of eight or ten years acquired all of that money as a result of personal work is to assume something that isn't true. We know as a matter of fact that during that time a large portion of that money was paid to him as compensation by the Government. As a matter of fact if the Government paid him total and permanent disability from the date of discharge it would have paid him a total of $25,000 by that time and during the period of time covered by this account because he did not put in application for his compensation until after the bank account had been started in 1923 (R. p. 60) and the Government then would have paid his compensation back to the date of discharge. So that if he put nothing else in his bank account other than the compensation paid to him by the Government then he would have accounted for practically all of the money or at least the greater portion of it.

Our Supreme Court has laid down the rule that must be applied. Their language is:

> "Total and permanent disability is to be considered reasonably and having regard to the circumstances of each case; that which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves without serious loss of productive power against injury or disease sufficient

totally to disable others." *Lumbra vs. U. S. 290 U. S. 551 78 L. Ed. 492.*

The reason, justice and good sense behind this language of the Supreme Court is very evident in this case.

"That which sometimes results in total disability may cause slight inconvenience under other conditions"—how applicable here are these words. A man slightly ill is not given treatment—is sent back to "duty"—struggles along and attempts to do so—becomes a prey for other diseases because of his weakened physical condition which probably could have been obviated under other circumstances and under other conditions if he had received treatment—not having received treatment he becomes the victim of mumps which under proper conditions and circumstances would not have been particularly disabling—he receives no treatment—therefore, they were allowed to go down on him which in itself might not be particularly disabling under other circumstances—still he is not given treatment—is compelled to do "duty"—to pack a 73 pound pack on a two mile hike—it completely knocks him out—still receiving no treatment—is sent overseas and encounters gas with very virulent effects because of the circumstances that preceded the gassing, had they not been present, and had they not existed, the gas might not have been particularly disabling but which, because of the conditions and these particular circumstances, became extremely disabling—he goes on and is gassed again—is blown up by a high explosive shell—all of which because of the particular conditions existing and because of the dis-

tinctive "circumstances of this case", brought about the pronounced condition of shell shock described by his buddies and made him turn an old man overnight and left him nerve wracked, the victim of hellish nightmares and dreams sufficient to upset even a well man and left his weakened constitution, impaired by internal abnormalties, his heart overtaxed and strained beyond the point where he could work without endangering his life—his mind and nerves completely wracked—in fact left him the total wreck he was in the eyes of all who saw him.

CONCLUSION

No error was committed by the lower court in the admission of the opinion evidence assigned as error in that the objections now urged were not raised in the court below and are raised for the first time on appeal. The evidence amply sustains the verdict and is uncontradicted. Consequently the decision of the lower court should be affirmed.

Respectfully submitted,

MOLUMBY, BUSHA & GREENAN,
Attorneys for the Appellee.

No. 7788

United States

Circuit Court of Appeals

For the Ninth Circuit.

PHILIP N. LILIENTHAL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

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[**Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.**]

APPEARANCES.

For Taxpayer:
JOHN C. ALTMAN, Esq.

For Comm'r:
W. FRANK GIBBS, Esq.

Docket No. 56815

PHILIP N. LILIENTHAL,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES.

1931

Apr. 20—Petition received and filed. Taxpayer notified. (Fee paid)

" 20—Copy of petition served on General Counsel.

Jul. 31—Answer filed by General Counsel.

Aug. 8—Copy of answer served on taxpayer. Circuit Calendar.

1934

Apr. 18—Hearing set week of July 2, 1934 at San Francisco, California.

1934

Jul. 5—Hearing had before Mr. Morris on merits. Submitted. Stipulation of facts filed. Petitioner's brief due August 25, 1934. Respondent's brief due 9/10/34—Petitioner's reply due 9/25/34.

" 17—Transcript of hearing of July 5, 1934 filed.

Aug. 6—Motion for extension to 9/10/34 to file brief filed by taxpayer.

" 7—Motion for extension to 9/10/34 to file brief granted.

Sep. 4—Brief filed by General Counsel.

" 8—Brief filed by taxpayer. 9/10/34 copy served on General Counsel.

" 28—Memorandum opinion rendered, Logan Morris, Div. 14. Judgment will be entered for the respondent.

" 29—Decision entered, Div. 14, Logan Morris.

Dec. 17—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 17—Proof of service filed by taxpayer.

1935

Jan. 24—Motion for 30 days extension to complete record filed by taxpayer.

" 24—Order enlarging time to March 18, 1935 for preparation of evidence and delivery of record entered.

Feb. 11—Agreed statement of evidence lodged.

" 11—Praecipe with proof of service thereon filed.

" 12—Agreed statement of evidence approved and ordered filed. [1*]

United States Board of Tax Appeals

Docket No. 56815

PHILIP N. LILIENTHAL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:E-1-JHU-60D) dated March 9, 1931, and as a basis of his proceeding, alleges as follows:

I.

The petitioner is an individual, with his place of business at No. 2 Pine Street, San Francisco, California.

II.

The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A") was mailed to the petitioner on March 9, 1931.

III.

The taxes in controversy are individual income taxes for the calendar year 1927 and for the sum of $38,107.54; the entire amount of said taxes is in dispute. [2]

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

1. The determination by the Commissioner that Ruth H. Lilienthal, the wife of petitioner (petitioner and said Ruth H. Lilienthal having filed a single joint income tax return for the calendar year 1927) realized during the calendar year 1927 taxable capital net gain in the sum of $556,449.12 in connection with the exchange by said Ruth H. Lilienthal of 4400 shares of common stock of Southern California Gas Company, of the par value of $25.00 per share, for $260,609.12 cash and Southern California Gas Corporation Collateral Trust Gold Bonds 5%, Series due 1937, of the par value of $339,500.00. In this behalf, petitioner sets forth that said exchange was made in pursuance of a plan of reorganization (as defined in Section 203 (h) (1) (A) of the Revenue Act of 1926) and that by virtue of the provisions of Section 203, subdivision (b) (2) and subdivision (d) (1) of the said Act of 1926, the taxable gain to said Ruth H. Lilienthal to be recognized upon such exchange is limited to the amount of cash received by her. Accordingly, the taxable capital net gain realized by said Ruth H. Lilienthal in connection with said exchange was the sum of $260,609.12, and no more, as was reported by petitioner in the single joint income tax return as originally filed for the year 1927.

V.

The facts upon which petitioner relies as the basis of this proceeding are as follows:

1. During the entire calendar year 1927, petitioner and Ruth H. Lilienthal were, and now are, husband and wife and living [3] together as such. Pursuant to the provisions of Section 223, subdivision (b) of the Revenue Act of 1926, petitioner and said Ruth H. Lilienthal did elect to make a single joint income tax return for the calendar year 1927 and in accordance with such election, petitioner did, within the time and in the manner required by law, execute and file an income tax return, wherein there was included the income of petitioner and of said Ruth H. Lilienthal, his wife, for the calendar year 1927.

2. In June, 1920, said Ruth H. Lilienthal acquired by gift from Abraham Haas, 1000 shares of common stock of Southern California Gas Company, of the par value of $100.00 per share. Said Abraham Haas died in August, 1921, and the said 1000 shares of stock were included in the gross estate of Abraham Haas at a valuation of $15,000.00 for Federal Estate Tax purposes, upon the ground that the transfer of said shares of stock by Abraham Haas to Ruth H. Lilienthal was made in contemplation of death. On August 11, 1921, said Ruth H. Lilienthal acquired by bequest and inheritance from said Abraham Haas, 100 additional shares of common stock of Southern California Gas Company, of the par value of $100.00 per share, and said 100 shares of stock were included in the gross estate of Abraham Haas at a valuation of $1500.00 for Federal Estate Tax purposes. In November, 1926, said

Ruth H. Lilienthal received in exchange for said 1100 shares of common stock of Southern California Gas Company, of the par value of $100.00 per share, 4400 shares of common stock of said Southern California Gas Company, of the par value of $25.00 per share. By virtue of the foregoing, the cost basis to said Ruth H. Lilienthal, for income tax purposes, [4] of said 4400 shares of common stock of Southern California Gas Company was and is the sum of $16,500.00. Said Ruth H. Lilienthal continuously held and owned said shares of common stock of Southern California Gas Company from the time of their acquisition by her as aforesaid, until November, 1927.

3. In the year 1927, there were two existing corporations, viz, Southern California Gas COMPANY and Midway Gas Company. In pursuance of a plan of reorganization, a third corporation was organized in the year 1927 known as "Southern California Gas CORPORATION"; this latter corporation acquired, during the year 1927, in excess of ninety-five per cent of the issued and outstanding capital stock of Midway Gas Company for cash and its bonds, viz: Bonds of Southern California Gas CORPORATION. This new corporation, viz: Southern California Gas CORPORATION, also acquired, during the year 1927, in pursuance of the foregoing plan of reorganization, 319,116 shares of common stock of Southern California Gas COMPANY for cash and its bonds, viz: Bonds of Southern California Gas CORPORATION. At the time

of the acquisition by Southern California Gas CORPORATION of said 319,116 shares of common stock of Southern California Gas COMPANY, the issued and outstanding shares of stock of Southern California Gas COMPANY consisted of 320,000 shares of common stock and 166,879 shares of preferred stock, and each of said classes of stock, to-wit: Said common stock and said preferred stock of Southern California Gas COMPANY constituted "voting stock" and had full and equal voting privileges. That said Southern California Gas CORPORATION, in pursuance of said plan of reorganization, acquired more than a majority (and to-wit: in excess of 65 per cent) of the voting stock of said Southern California Gas Company. That [5] at the time of said acquisition, said Southern California Gas COMPANY had no shares of stock issued or outstanding or authorized other than as above set forth, and had no shares of stock issued or outstanding or authorized which did not constitute voting stock or which did not have full and equal voting privileges.

4. During the month of November, 1927, said Ruth H. Lilienthal, in pursuance of the foregoing plan of reorganization, exchanged said 4400 shares of common stock of Southern California Gas COMPANY of the par value of $25.00 per share, acquired and owned by her as aforesaid, for the net sum of $260,609.12 cash and $339,500.00 par value of collateral trust gold bonds 5% series due 1937, of Southern California Gas CORPORATION.

VI.

That during the calendar year 1928, petitioner paid to the Collector of Internal Revenue at San Francisco, the sum of $43,235.16 as and for income taxes due from petitioner and his wife, Ruth H. Lilienthal, computed on the aggregate income of petitioner and said Ruth H. Lilienthal for the calendar year 1927.

WHEREFORE, your petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income taxes herein, and for such other and further relief as may be meet and proper in the premises.

JOHN C. ALTMAN
RICHARD S. GOLDMAN
Counsel for Petitioner,
615 Russ Building,
San Francisco, California. [6]

State of California,
City and County of San Francisco.—ss.

Philip N. Lilienthal, being first duly sworn, deposes and says:

That he is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated are true.

PHILIP N. LILIENTHAL

Subscribed and sworn to before me this 13th day of April, 1931.

[Seal] LOUIS WIENER
Notary Public in and for the City and County of San Francisco, State of California. [7]

EXHIBIT "A"

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to Mar. 9, 1931

Mr. Philip N. Lilienthal,
2 Pine Street,
San Francisco, California.

Sir:

You are advised that the determination of your tax liability for the year(s) 1927 discloses a deficiency of $38,107.54, as shown in the statement attached.

In accordance with section 274 of the Revenue Act of 1926, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges,

since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By J. C. WILMER
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870 [8]

IT:AR:E-1
JHU-60D

In re: Mr. Philip N. Lilienthal,
2 Pine Street,
San Francisco, California.

Tax Liability

Year—1927
Tax Liability—$81,342.70
Tax Assessed—$43,235.16
Deficiency—$38,107.54

The report of the internal revenue agent in charge at San Francisco, California, covering an investigation of your income tax liability for the year 1927 has been reviewed by this office and approved with the following exceptions:

Profit from the exchange of stock of the Southern California Gas Company for cash and bonds of the Southern California Gas Corporation has been adjusted.

The net tax previously assessed is $43,235.16 instead of $43,239.66.

The adjustment of these items increases the deficiency indicated by the report from $1,114.74 to $38,107.54.

The deficiency was determined as follows:

Ordinary net income reported on return		$ 64,451.57
Capital net gain reported on return		305,579.77
Total net income reported		$370,031.34
Add:		
1. Dividends	$ 1,200.00	
2. Losses disallowed	5,550.00	
3. Capital gain	294,706.42	301,456.42
Total net income adjusted		671,487.76

[9]

Computation of Tax

Total net income adjusted		$671,487.76
Less:		
Capital net gain included		600,286.19
Ordinary net income adjusted		$ 71,201.57
Less:		
Dividends	$60,797.78	
Liberty bond interest	242.25	
Personal exemption and credit for dependents	4,300.00	$ 65,340.03
Net income subject to normal tax		$ 5,861.54
Normal tax at 1½% on $ 4,000.00		60.00
Normal tax at 3% on $ 1,861.54		55.85
Surtax on $ 71,201.57		6,276.28
Tax at 12½% on $600,286.19		75,035.77
Total		$ 81,427.90
Less:		
Earned income credit	$ 2.62	
Tax paid at source	82.58	85.20
Total amount assessable		$ 81,342.70
Tax previously assessed	$43,239.66	
Allowed	4.50	43,235.16
Deficiency		$ 38,107.54

Explanation of Changes

1. The amount of $1,200.00 represents a distribution of $4.00 a share on 300 shares of stock of the California Wine Association. Inasmuch as the distribution was from earnings, the amount has been transferred from capital gain and included in dividends.

2. The deduction of $5,550.00 claimed for loss on investments in the Newland Electric Rights, Limited, Newland Patent Rights, Limited and Newland Magnets Company has been disallowed for the reason that the information furnished is not sufficient to establish the fact that the loss was deductible in the year 1927. [10]

3. You reported as capital gain $308,201.69 from the exchange of stock of the Midway Gas Company and the Southern California Gas Company for bonds of the Southern California Gas Corporation and cash. The amount which you reported represented the cash received. It is held that the profit resulting to the stockholders on the exchange of their stock in the Midway Gas Company is to be determined in accordance with section 203(d)(1) of the Revenue Act of 1926. The taxable gain in this case cannot exceed the amount received in cash.

With reference to the exchange of stock of the Southern California Gas Company, it is held that this transaction does not fall within the provisions of section 203(d)(1) of the 1926 Act. For the purpose of determining the amount of gain or loss, the total consideration received for the stock disposed of is the fair market value of the bonds as of the effective date of the transaction, plus the amount received in cash. Capital net gain, therefore, has been adjusted as follows:

4400 shares of Southern California Gas Company (par value $25.00) exchanged for:	
(a) 243.907 per $100.00 par value cash	$268,297.70
(b) 308.702 per $100.00 par value bonds (fair market value, 92)	312,406.42
Total	$580,704.12
Appraised value of original stock	16,500.00
Gross profit on Southern California stock	$564,204.12
Gross profit on Midway Gas Company stock (limited to cash received)	48,781.40
Proceeds, sale of fractional bonds	287.59
Total gross profit	$613,273.11
Less: Proportionate share of expenses	9,165.00
Net profit (capital gain)	$604,108.11
Profit reported on return	308,201.69
Additional profit from exchange	$295,906.42
Less:	
California Wine Association income transferred to dividends	1,200.00
Net increase in capital gain	$294,706.42

[11]

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1927, the Bureau will be

unable to afford you an opportunity under the provisions of article 1211 of Regulations 69 and/or article 451 of Regulations 74 to discuss your case before mailing formal notice of its determination as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency.

[Endorsed]: U. S. Board of Tax Appeals. Filed Apr. 30, 1931. [12]

[Title of Court and Cause.]

ANSWER.

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel for the Bureau of Internal Revenue and for answer to the petition of the above-named taxpayer admits and denies as follows, to-wit:

I, II, III. Admits the allegations contained in paragraphs I, II, and III of the petition.

IV(1). Denies the allegations of error contained in paragraph IV(1) of the petition.

V. Denies the allegations contained in paragraphs V(1) to (4), inclusive, of the petition.

Denies generally and specifically each and every allegation set forth in the petition not hereinbefore admitted, qualified, or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
MASON B. LEMING,
IRVING M. TULLAR,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: U. S. Board of Tax Appeals. Filed Jul. 31, 1931. [13]

[Title of Court and Cause.]

John C. Altman, Esq., for the petitioner.
W. Frank Gibbs, Esq., for the respondent.

MEMORANDUM OPINION.

MORRIS: The respondent having determined a deficiency in income tax of $38,107.54 for the calendar year 1927, the petitioner brings this proceeding for the redetermination thereof, alleging error by reason of the respondent's failure to hold that the acquisition of a majority of the capital stock of Southern California Gas Company by Southern California Gas Corporation for cash and bonds of the latter was a reorganization under the provisions of [14] section 203(h)(1) of the Revenue Act of 1926, and that by virtue of the provisions of section 203(b)(2) and (d)(1), the taxable gain to

the petitioner's wife (petitioner and his wife having filed a joint return for the taxable year in question) to be recognized upon such exchange should be limited to the amount of the cash received by her.

The petitioner is an individual, with his place of business at San Francisco, California, and with his residence at Burlingame, California.

During the entire calendar year 1927 petitioner and Ruth H. Lilienthal were, and continuously since said last mentioned date have been husband and wife and living together as such.

Pursuant to the provisions of Section 223, subdivision (b) of the Revenue Act of 1926, petitioner and said Ruth H. Lilienthal elected to make a single joint income tax return for the calendar year 1927, and in accordance with such election, petitioner, on or about the 14th day of March, 1928, filed with the Collector of Internal Revenue at San Francisco, California, a single joint income tax return for the calendar year 1927, wherein there was reported and included the income of petitioner and of said Ruth H. Lilienthal, his wife, for such calendar year 1927.

Continuously from August 1921 to November 1926, said Ruth H. Lilienthal was the owner of 1,100 shares of the common stock of Southern California Gas Company having a par value of $100 per share. In November 1926, she in a non-taxable exchange, for said 1,100 shares, received 4,400 shares of the common stock of said Southern California Gas Company having a par value of $25 per share and continuously owned said 4,400 shares to November 17,

1927. Said 4,400 shares had a cost basis of $16,500. [15]

In the year 1927 there were two existing corporations, Southern California Gas Company and Midway Gas Company, which were incorporated under the laws of the State of California, on October 5, 1910, and November 11, 1911, respectively.

The Southern California Gas Company was principally engaged in distributing natural and artificial gas to retail and industrial consumers. The Midway Gas Company was principally engaged in purchasing natural gas in the oil fields, transporting it to cities and selling it to distributing companies. Midway sold the bulk of its gas to Southern California Gas Company.

Under date of October 17, 1927, an agreement was entered into between some of the larger stockholders of the Southern California Gas Company and the Midway Gas Company and a Syndicate of Bankers composed of Chase Securities Corporation, Stone and Webster, Hunter, Dulin and Company, and Pynchon and Company, which agreement provided, among other things, that (1) the Southern California Gas Company was to acquire the properties and business of the Midway Gas Company for capital stock and bonds of the Southern California Gas Company, and (2) for the organization of a new corporation which was to acquire all or practically all of the common stock of the Southern California Gas Company and all of the capital stock of the Midway Gas Company for cash and bonds of the contemplated new company.

On October 4, 1927, the Midway Gas Company adopted resolutions authorizing the sale of its properties and business to the Southern California Gas Company. Said resolution provided that it was the plan of the board of directors that "said common capital stock and said bonds of the Southern California Gas Company to be received for Midway Gas Company assets shall [16] be distributed to the stockholders of this corporation when, as and if received by this corporation and as soon as such distribution may lawfully be made."

On October 17, 1927, the Southern California Gas Company had issued and outstanding 240,000 shares of common stock of a par value of $25 a share, and 182,226 shares of preferred stock of a par value of $25 a share. Both classes of stock had equal share voting rights. On said date the Midway Gas Company had issued and outstanding 23,264 shares of capital stock of a par value of $100 a share, all fully voting common stock.

On October 31, 1927, the Southern California Gas Company acquired all of the properties and business of the Midway Gas Company as of August 31, 1927, in consideration of a new issue of 80,000 shares of its capital stock of a par value of $25 a share and $2,942,000 face value of a new issue of bonds of said Southern California Gas Company due in 1957, and the assumption of Midway Gas Company's liabilities. Immediately after this transaction and throughout the remainder of 1927, the Southern California Gas Company had outstanding 320,000

shares of common capital stock, and 182,226 shares of voting preferred stock.

In accordance with the terms of the agreement of October 17, 1927, a new corporation, the Southern California Gas Corporation, was organized under the laws of the State of Delaware on November 12, 1927. Said corporation had an authorized capital stock of $16,500,000 consisting of $7,500,000 preferred and $9,000,000 common, all of which was issued and outstanding on [17] November 17, 1927. Under date of November 17, 1927, the Southern California Gas Corporation acquired under the provisions of the contracts of October 17 and November 17, 1927, and certain deposit agreements referred to in said contracts, 23,121 shares out of a total of 23,264 shares of capital stock of the Midway Gas Company, and 239,608 shares out of a total of 320,000 shares of the outstanding common stock of the Southern California Gas Company, for cash and bonds of the said Southern California Gas Company. [Corporation]

The Southern California Gas Corporation issued, on November 17, 1927, for the said shares of stock of Midway Gas Company and Southern California Gas Company, bonds having a par value of $24,942,000. Virtually all of the remaining $58,000 face value of bonds of that issue were subsequently issued in the acquisition of the remaining common stocks of the two said companies. The stocks of Southern California Gas Company and Midway Gas Company, acquired by Southern California Gas

Corporation, as herein set forth, were deposited with a trustee as collateral for the bonds issued as partial consideration therefor.

On November 17, 1927, the board of directors of Midway Gas Company declared a dividend of $2,942,000, and paid the same in Temporary Certificates of the First Mortgage and Refunding Gold Bonds, 5%, due 1957 of Southern California Gas Company.

These bonds were sold on November 17, 1927, at 95, and the proceeds therefrom were used by the Southern California Gas Corporation of Delaware in the acquisition of the stock of Midway Gas Company and of Southern California Gas Company, as aforesaid. [18]

On December 10, 1927, Midway Gas Company distributed the 80,000 shares of common stock of the Southern California Gas Company to its stockholders, one of whom was Southern California Gas Corporation, which received, as such stockholder, 79,508 of the 80,000 shares of the common stock of Southern California Gas Company.

Midway Gas Company did no business thereafter, but retained its charter until March 21, 1934, for the purpose of settling its prior years income taxes.

After the acquisition of the 319,116 shares of the common stock of the Southern California Gas Company by the Southern California Gas Corporation, as aforesaid, the Southern California Gas Company continued, and still does continue, its corporate existence. Its operations were enlarged as it

then had the gas gathering and transporting assets formerly owned by Midway Gas Company. There were some changes in its directorate and management.

Pursuant to the agreement of October 17, 1927, as modified by an agreement dated November 17, 1927, said Ruth H. Lilienthal received for her 4,400 shares of common stock of Southern California Gas Company, $260,609.12 cash and bonds of Southern California Gas Corporation of the par value of $339,500 and of the fair market value of $312,340.

The $260,609.12 was the amount of cash payable to said Ruth H. Lilienthal (including proceeds of sale of a fractional bond), after deducting $1.375 per share brokerage, commissions and her share of other expenses of carrying out the transaction.

The petitioner reported in his single joint income tax return for the calendar year 1927, a profit of $260,609.12, being the amount of the cash [19] received by said Ruth H. Lilienthal. Said Ruth H. Lilienthal did not, in 1927, sell or otherwise dispose of any of the bonds of Southern California Gas Corporation received for her stock.

The respondent adjusted said Ruth H. Lilienthal's income for 1927, by increasing the same in the amount of $295.840, representing the fair market value of the bonds received, after deducting from such fair market value the sum of $16,500, representing the cost to said Ruth H. Lilienthal of her stock.

The deficiency letter explained the adjustment as follows:

> With reference to the exchange of stock of the Southern California Gas Company, it is held that this transaction does not fall within the provisions of Section 203 (d) (1) of the 1926 Act. For the purpose of determining the amount of gain or loss, the total consideration received for the stock disposed of is the fair market value of the bonds as of the effective date of the transaction, plus the amount received in cash. Capital net gain therefore has been adjusted * * *.

The facts of this case and the issue presented are, as the respondent contends and the petitioner concedes, identical with those in J. S. Rippel & Company, 30 B. T. A. 1146, wherein we held that there was no reorganization within the meaning of section 203 (h) (1) of the Revenue Act of 1926, and that, therefore, the gain derived by the petitioner upon the exchange of stock in one corporation for cash and bonds of the other was recognizable for tax purposes to the extent of both cash and bonds so received. Accordingly, we have no other alternative than to sustain the respondent's determination.

Judgment will be entered for the respondent.

[Endorsed]: Entered Sep. 28, 1934. [20]

United States Board of Tax Appeals
Washington

Docket No. 56815

PHILIP N. LILIENTHAL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered September 28, 1934, it is

ORDERED and DECIDED: That there is a deficiency of $38,107.54 for the calendar year 1927.

[Seal] (Signed) LOGAN MORRIS,
Member.

[Endorsed]: Entered Sep. 29, 1934. [21]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Now comes Philip N. Lilienthal, by his attorneys, John C. Altman and Richard S. Goldman, and respectfully shows:

I.

That petitioner on review (hereinafter referred to as petitioner) is an individual, with his place of business at San Francisco, California, and with his residence at Burlingame, California. During the entire calendar year 1927, petitioner and Ruth H. Lilienthal were husband and wife, and living together as such. Pursuant to the provisions of Section 223, subdivision (b) of the Revenue Act of 1926, petitioner and said Ruth H. Lilienthal elected to make a single joint income tax return for the calendar year 1927, and in accordance with such election, petitioner, on or about the 14th day of March, 1928, filed with the Collector of [22] Internal Revenue, for the First District of California, at San Francisco, California, a single joint income tax return for the year 1927 involved herein, wherein there was reported and included the income of petitioner and of said Ruth H. Lilienthal, his wife, for such calendar year 1927. The office of said Collector is located within the Judicial Circuit of the United States Circuit Court of Appeals, for the Ninth Circuit. Respondent on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

II.

The nature of the controversy is as follows:

On November 17, 1927, Ruth H. Lilienthal was the owner of 4,400 shares of common stock of South-

ern California Gas Company (hereinafter referred to as Old Southern), having a par value of $25.00 per share; said shares of stock had a cost basis of $16,500.00, and constituted "capital assets" within the purview of Section 208 of the Revenue Act of 1926.

III.

On November 17, 1927, Ruth H. Lilienthal received in exchange for said shares of stock $339,500.00 par value of bonds of Southern California Gas Corporation (hereinafter referred to as New Southern) and cash in the sum of $260,609.12; said bonds had at date of receipt, a fair market value of $312,340.00.

Petitioner reported in a single joint income tax return for the year 1927, a profit on the above exchange of $260,609.12, [23] being the amount of cash received by Ruth H. Lilienthal, but considered the bonds of New Southern as having been received in a nonrealizing transaction, to-wit: in connection with a reorganization resulting from the acquisition by New Southern of a majority of the capital stock of Old Southern in exchange for bonds of New Southern and cash.

In determining the profit on the transaction, the Commissioner adjusted Ruth H. Lilienthal's income for 1927 by increasing the same in the amount of $295,840.00, representing the excess of the fair market value of bonds received over the cost to Ruth H. Lilienthal of her 4,400 shares of stock of Old Southern.

The Commissioner, pursuant to Section 274 of the Revenue Act of 1926, notified Philip N. Lilienthal, petitioner, of his determination of income tax liability for the year 1927, and petitioner duly filed a petition with the United States Board of Tax Appeals from the Commissioner's determination for said year. The proceeding was duly heard before the Board. The Board's opinion was promulgated on September 28, 1934, and its decision fixing the amount of tax liability pursuant to the opinion was entered on September 29, 1934.

The Board decided that the acquisition by New Southern of a majority of the capital stock of Old Southern for cash and bonds of New Southern did not constitute a reorganization within the meaning of Section 203 (h) (1) of the Revenue Act of 1926, and that therefore the gain derived by Ruth H. Lilienthal upon the exchange of stock of Old Southern for cash and bonds of New [24] Southern was recognizable for income tax purposes to the extent of both the cash and bonds so received.

Petitioner contends that the acquisition by New Southern of a majority of the capital stock of Old Southern for cash and bonds constituted a reorganization under the provisions of Section 203 (h) (1) of the Revenue Act of 1926 and that by virtue of the provisions of subdivisions (b) (2) and (d) (1) of Section 203 of the Revenue Act of 1926, the taxable gain to Ruth H. Lilienthal to be recognized upon such exchange should be limited to the amount of cash received by Ruth H. Lilienthal.

If the position of the Commissioner, as sustained by the Board, be correct, then the amount of the deficiency as determined is unassailable; on the other hand, if the position of petitioner be correct, there is no deficiency herein.

IV.

The petitioner's assignments of error are as follows:

(1) The Board of Tax Appeals erred in holding and deciding that the acquisition by Southern California Gas Corporation (New Southern) of a majority of the capital stock of Southern California Gas Company (Old Southern) for cash and bonds of New Southern did not constitute a reorganization within the meaning of Clause (A) of Section 203 (h) (1) of the Revenue Act of 1926.

(2) The Board of Tax Appeals erred in not holding and deciding that the acquisition by New Southern of a majority of the capital stock of Old Southern for cash and bonds of New Southern constituted a reorganization within the meaning of Clause (A) of Section 203 (h) (1) of the Revenue Act of 1926. [25]

(3) The Board erred in holding and deciding that the gain derived by Ruth H. Lilienthal upon the exchange of stock of Old Southern for cash and bonds of New Southern was recognizable for income tax purposes to the extent of both cash and bonds so received.

(4) The Board erred in not holding and deciding that the taxable gain derived by Ruth H. Lilienthal

upon the exchange of stock of Old Southern for cash and bonds of New Southern was limited to the amount of cash received by Ruth H. Lilienthal.

(5) The Board erred in holding and deciding that there is a deficiency in income taxes for 1927 of $38,107.54, or any other sum.

(6) The Board erred in not holding and deciding that there is no deficiency in income taxes for 1927.

WHEREFORE, petitioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals, for the Ninth Circuit; that a transcript of the record be prepared in accordance with law and with the rules of said Court, and transmitted to the Clerk of the said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

JOHN C. ALTMAN
RICHARD S. GOLDMAN
Attorneys for Petitioner,
615 Russ Building,
San Francisco, California. [26]

State of California,
City & County of San Francisco.—ss.

John C. Altman, being first duly sworn, deposes and says: That he is one of the attorneys of record for petitioner in the above matter, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge.

JOHN C. ALTMAN

Subscribed and sworn to before me this 10th day of December, 1934.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires July 30, 1935.

[Endorsed]: U. S. Board of Tax Appeals. Filed Dec. 17, 1934. [27]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To: GUY T. HELVERING,
Commissioner of Internal Revenue,
Washington, D. C.
ROBERT H. JACKSON,
Assistant General Counsel for Bureau of Internal Revenue,
Washington, D. C.

YOU ARE HEREBY NOTIFIED that Philip N. Lilienthal, petitioner, did on the 17 day of December, 1934, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals, for the Ninth Circuit, of the decision of the Board heretofore rendered in the above entitled action. A copy of the petition for review and the assignments of error as filed, is hereto attached and served upon you.

Dated this 17 day of December, 1934.

JOHN C. ALTMAN
RICHARD S. GOLDMAN
Attorneys for Petitioner.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein is hereby acknowledged this 17 day of December, 1934.

GUY T. HELVERING
Respondent on Review.
ROBERT H. JACKSON
Assistant General Counsel for the
Bureau of Internal Revenue,
Attorney for Respondent on Review.

[Endorsed]: U. S. Board of Tax Appeals. Filed Dec. 17, 1934. [28]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

This cause came on for hearing before the Honorable Logan Morris, Member of the United States Board of Tax Appeals, on July 5, 1934, at San Francisco, California. John C. Altman, Esq., appeared for petitioner, and Robert H. Jackson, Esq., Assistant General Counsel for the Bureau of Internal Revenue, appeared for the respondent.

The entire evidence presented to the Board was in the form of a written stipulation of facts, entered into between petitioner and respondent and

filed with the Board at the hearing of the cause. The evidence presented in said written stipulation of facts is in narrative form and is as follows:

STIPULATED FACTS:

1. The petitioner is an individual, with his place of business at San Francisco, California, and with his [29] residence at Burlingame, California. During the entire calendar year 1927 petitioner and Ruth H. Lilienthal were, and continuously since said last mentioned date have been husband and wife and living together as such. Pursuant to the provisions of Section 223, subdivision (b) of the Revenue Act of 1926, petitioner and said Ruth H. Lilienthal did elect to make a single joint income tax return for the calendar year 1927, and in accordance with such election, petitioner did, on or about the 14th day of March, 1928, file with the Collector of Internal Revenue at San Francisco, California, a single joint income tax return for the calendar year 1927, wherein there was reported and included the income of petitioner and said Ruth H. Lilienthal, his wife, for such calendar year 1927.

2. Continuously from August 1921 to November 1926, said Ruth H. Lilienthal was the owner of 1100 shares of the common stock of Southern California Gas Company having a par value of $100.00 per share. In November 1926, the said Ruth H. Lilienthal in a non-taxable exchange for said 1100 shares, received 4400 shares of the common stock of said Southern California Gas Company having a par

value of $25.00 per share and continuously owned said 4400 shares to November 17, 1927. Said 4400 shares had a cost basis of $16,500.00 to said Ruth H. Lilienthal.

3. In the year 1927 there were two existing corporations, Southern California Gas Company and Midway Gas Company, which were incorporated under the laws of the State of California, on October 5, 1910, and November 11, 1911, respectively. [30]

4. The Southern California Gas Company was principally engaged in distributing natural and artificial gas to retail and industrial consumers. The Midway Gas Company was principally engaged in purchasing natural gas in the oil fields, transporting it to cities and selling it to distributing companies. Midway sold the bulk of its gas to Southern California Gas Company.

5. Under date of October 17, 1927, an agreement was entered into between some of the larger stockholders of the Southern California Gas Company and the Midway Gas Company and a Syndicate of Bankers composed of Chase Securities Corporation, Stone and Webster, Hunter, Dulin and Company, and Pynchon and Company, which Agreement provided, among other things, that (1) the Southern California Gas Company was to acquire the properties and business of the Midway Gas Company for capital stock and bonds of the Southern California Gas Company, and (2) for the organization of a new corporation which was to acquire all or prac-

tically all of the common stock of the Southern California Gas Company and all of the capital stock of the Midway Gas Company for cash and bonds of the contemplated new company. A copy of said Agreement is attached hereto and marked Exhibit "A".

6. On October 4, 1927, the Midway Gas Company adopted resolutions authorizing the sale of its properties and business to the Southern California Gas Company. Said resolution provided that it was the plan of the Board of Directors that "said common capital stock and said bonds of the Southern Cali- [31] fornia Gas Company to be received for Midway Gas Company assets shall be distributed to the stockholders of this corporation when, as and if received by this corporation and as soon as such distribution may lawfully be made."

7. On October 17, 1927, the Southern California Gas Company had issued and outstanding 240,000 shares of common stock of a par value of $25.00 a share, and 182,226 shares of preferred stock of a par value of $25.00 a share. Both classes of stock had equal share voting rights. On said date the Midway Gas Company had issued and outstanding 23,264 shares of capital stock of a par value of $100.00 a share, all fully voting common stock.

8. On October 31, 1927, the Southern California Gas Company acquired all of the properties and business of the Midway Gas Company as of August 31, 1927, in consideration of a new issue of 80,000 shares of its capital stock of a par value of $25.00 a share and $2,942,000.00 face value of a new issue

of bonds of said Southern California Gas Company due in 1957, and the assumption of Midway Gas Company's liabilities. Immediately after this transaction and throughout the remainder of 1927, the Southern California Gas Company had outstanding 320,000 shares of common capital stock, and 182,226 shares of voting preferred stock.

9. In accordance with the terms of the Agreement of October 17, 1927, (Exhibit "A") a new corporation, the Southern California Gas Corporation, was organized under the laws of the State of Delaware on November 12, 1927. Said corporation had [32] an authorized capital stock of $16,500,000.00 consisting of $7,500,000.00 preferred and $9,000,000.00 common, all of which was issued and outstanding on November 17, 1927. Under date of November 17, 1927, the Southern California Gas Corporation acquired under the provisions of the contracts of October 17 and November 17, 1927, (Exhibits "A" and "B" respectively, which are attached hereto) and certain deposit agreements referred to in said contracts, 23,121 shares out of a total of 23,264 shares of capital stock of the Midway Gas Company, and 239,608 shares out of a total of 320,000 shares of the outstanding common stock of the Southern California Gas Company, for cash and bonds of the said Southern California Gas Corporation.

The Southern California Gas Corporation issued, on November 17, 1927, for the said shares of stock of Midway Gas Company and Southern California

Gas Company, bonds having a par value of $24,942,000. Virtually all of the remaining $58,000 face value of bonds of that issue were subsequently issued in the acquisition of the remaining common stocks of the two said companies. The stocks of Southern California Gas Company and Midway Gas Company, acquired by Southern California Gas Corporation, as herein set forth, were deposited with a trustee as collateral for the bonds issued as partial consideration therefor.

10. On November 17, 1927, the Board of Directors of Midway Gas Company declared a dividend of $2,942,000, and paid the same in Temporary Certificates of the First Mortgage [33] and refunding Gold Bonds, 5%, due 1957 of Southern California Gas Company.

These bonds were sold on November 17, 1927, at 95, and the proceeds therefrom were used by the Southern California Gas Corporation of Delaware in the acquisition of the stock of Midway Gas Company and of Southern California Gas Company, as aforesaid.

On December 10, 1927, Midway Gas Company distributed the 80,000 shares of common stock of the Southern California Gas Company to its stockholders, one of whom was Southern California Gas Corporation, which received, as such stockholder, 79,508 of the 80,000 shares of the common stock of Southern California Gas Company.

Midway Gas Company did no business thereafter, but retained its charter until March 21, 1934, for the purpose of settling its prior years income taxes.

11. After the acquisition of the 319,116 shares of the common stock of the Southern California Gas Company by the Southern California Gas Corporation, as aforesaid, the Southern California Gas Company continued, and still does continue, its corporate existence. Its operations were enlarged as it then had the gas gathering and transporting assets formerly owned by Midway Gas Company. There were some changes in its directorate and management.

12. Pursuant to the agreement of October 17, 1927, Exhibit "A", as modified by an agreement dated November 17, 1927, a copy of which is attached and marked Exhibit "B", said Ruth H. [34] Lilienthal received for her 4400 shares of common stock of Southern California Gas Company, $260,-609.12 cash and bonds of Southern California Gas Corporation of the par value of $339,500.00 and of the fair market value of $312,340.00.

The $260,609.12 was the amount of cash payable to said Ruth H. Lilienthal (including proceeds of sale of a fractional bond), after deducting $1.375 per share brokerage, commissions and her share of other expenses of carrying out the transaction.

13. The petitioner reported in his single joint income tax return for the calendar year 1927, a profit of $260,609.12, being the amount of the cash received by said Ruth H. Lilienthal. Said Ruth H. Lilienthal did not, in 1927, sell or otherwise dispose of any of the bonds of Southern California Gas Corporation received for her stock.

14. The respondent adjusted said Ruth H. Lilienthal's income for 1927, by increasing the same in the amount of $295,840.00, representing the fair market value of the bonds received, after deducting from such fair market value the sum of $16,500.00, representing the cost to said Ruth H. Lilienthal of her stock.

The deficiency letter explained the adjustment as follows:

> "With reference to the exchange of stock of the Southern California Gas Company, it is held that this transaction does not fall within the provisions of Section 203(d)(1) of the 1926 Act. For the purpose of determining the amount of gain or loss, the total consideration received for the stock disposed of is the fair market value of the bonds as of the effective date of the transaction, plus the amount received in cash. Capital net gain therefore has been adjusted * * *." [35]

EXHIBIT "A"

AGREEMENT, dated October 17, 1927, between the corporations whose names are subscribed hereto (hereinafter called the "Shareholders"), parties of the first part, and CHASE SECURITIES CORPORATION, a corporation of the State of New York, STONE & WEBSTER, INC., a corporation of the Commonwealth of Massachusetts, HUNTER,

DULIN & CO., a corporation of the State of California, and PYNCHON & CO., a copartnership (hereinafter called the Bankers), parties of the second part,

WITNESSETH:

WHEREAS, the Southern California Gas Company (herein called the "Southern Company") is a corporation of the State of California owning certain public utility properties in said state and has outstanding $6,000,000 par value of common stock divided into 240,000 shares of the par value of $25 each, certain shares of preferred stock and certain bonds and indebtedness, and the Midway Gas Company (herein called the "Midway Company") is also a corporation of the State of California owning certain public utility properties in said State and has outstanding $2,326,400 par value of capital stock divided into 23,264 shares of the par value of $100 each; and

WHEREAS, the Southern Company plans to refund certain of its bonds and indebtedness and also to acquire the properties and assets of the Midway Company and proposes to issue $5,704,000 principal amount of its First Mortgage and Refunding Gold Bonds, 5% Series, due 1957, for such refunding and other corporate purposes and $2,942,000 of its said bonds and $2,000,000 par value of its common stock (additional to the $6,000,000 of common stock now outstanding) [36] in exchange for the properties and assets of the Midway Company, and the Bankers are to purchase said $5,704,000 principal amount

of bonds from the Southern Company and are to offer to the public therewith said $2,942,000 principal amount of bonds to be issued to the Midway Company and to arrange for a delivery to them of all or substantially all of said last mentioned bonds by the stockholders of the Midway Company when the same shall be distributed to them; and

WHEREAS, the Railroad Commission of the State of California has duly authorized, by Decision No. 18918, dated October 11, 1927 the issue of said bonds and said $2,000,000 par value of common stock of the Southern Company; and

WHEREAS, the Bankers propose to organize a company (herein called the "New Company") to purchase or otherwise acquire all or substantially all of the common stock of the Southern Company (including the common stock to be issued to the Midway Company as aforesaid) and the capital stock of the Midway Company upon the terms hereinafter set forth and

WHEREAS, the Shareholders own or control a large majority of the common stock of the Southern Company and of the stock of the Midway Company now outstanding, to-wit: 224,040 shares of the common stock of the Southern Company and 14,389 shares of the stock of the Midway Company, and additional amounts of said outstanding stocks—to-wit: not less than 14,850 shares of the common stock of the Southern Company and not less than 8,490 shares of the stock of the Midway Company—have been deposited with the Union Bank & Trust

Company of Los Angeles, California, under certain deposit agreements dated June 24, 1927, one agreement relating to the stock of the Southern Company and the other [37] to the stock of the Midway Company, subject to the control of the respective Committees named in said agreements, and the Shareholders and the said Committees (as authorized by said deposit agreements) propose to transfer or cause to be transferred to the New Company the shares of common stock of the Southern Company and the shares of stock of the Midway Company, respectively, so owned or controlled by the Shareholders and/or said Committees, for the price and under the conditions provided herein;

NOW THEREFORE, in consideration of the premises and of the mutual covenants hereinafter set forth, it is agreed as follows:

I.

It is agreed between the parties hereto that the Bankers may make a public offering of the $2,942,000 principal amount of said bonds of the Southern Company to be issued to the Midway Company in exchange for its properties and assets as aforesaid, at the same time and as a part of the offering by the Bankers of the $5,705,000 principal amount of said bonds which the Bankers are to purchase directly from the Southern Company as aforesaid; and it is understood that the said $2,942,000 of bonds of the Southern Company to go to the Midway Company as aforesaid are to be distributed to the New Company as a stockholder of the Midway Company

and the other stockholders thereof and that the Bankers shall cause the New Company to deliver that part of said $2,942,000 of bonds so distributed to it to the Bankers at the same time and place that the bonds to be purchased directly from the Southern Company are delivered, against payment therefor at the price in percentage of the principal amount and accrued interest to be paid to the Southern Company for the bonds purchased by the Bankers directly from it. [38]

II.

The Bankers agree:

(a) To organize the New Company forthwith under the laws of such State and with such name and such corporate powers as shall be approved by counsel for the Bankers and counsel for the Shareholders.

(b) To purchase from the New Company its common and/or preferred stock (in such amount as the Bankers shall determine) and to pay therefor an amount of money in cash sufficient to pay that part of the purchase price payable under the provisions of Division IV hereof in cash for the shares of Common stock of the Southern Company and shares of stock of the Midway Company which shall be transferred to the New Company pursuant to this agreement, less the proceeds to the New Company of the sale of said $2,942,000 principal amount of said bonds of the Southern Company to be issued to the Midway Company as aforesaid.

(c) To cause the New Company to authorize and issue its Collateral Trust Bonds "5% Series, due 1937", under a Collateral Trust Indenture substantially in the form of the draft indenture agreed to by the parties hereto with such changes as may be approved by the respective boards of directors of the Shareholders and Counsel for the Bankers, to a principal amount sufficient to pay that part of the purchase price payable under the provisions of Division IV hereof in such bonds for the shares of common stock of the Southern Company and the shares of stock of the Midway Company which shall be transferred to the New Company pursuant to this agreement, such bonds to be used in part payment for the shares of the Southern Company and of the Midway Company to be purchased by the New Company under this agreement. [39]

(d) To cause the New Company to purchase and pay for the common stock of the Southern Company and the stock of the Midway Company to be transferred to the New Company hereunder, at the price and under the conditions herein provided.

(e) To cause the New Company, as soon as practicable under the laws of California, to cause the said $2,000,000 par value of stock of the Southern Company to be issued to the Midway Company for its properties and assets as aforesaid, to be distributed by way of liquidation or otherwise to the Shareholders of the Midway Company, to the end that the New Company, as the holder of the stock of the Midway Company to be transferred here-

under, will acquire at least its pro rata share of the said $2,000,000 par value of common stock of the Southern Company.

III.

The Shareholders agree:

To transfer or cause to be transferred to the New Company, at the prices and under the conditions herein set forth, all of the shares of the common stock of the Southern Company and of the stock of the Midway Company owned or controlled by the Shareholders and the stock deposited with the Union Bank & Trust Company of Los Angeles, California, as aforesaid; and to use their best efforts to cause the holders of other shares of the common stock of the Southern Company and of the stock of the Midway Company to transfer such shares to the New Company, at the prices therefor, respectively set forth in paragraphs (x) and (y) of Division IV hereof.

IV.

The purchase price of said outstanding stock of the Southern Company and the stock of the Midway Company owned or controlled by the Share- [40] holders as aforesaid, is as follows:

(a) For each such share of the Common stock of the Southern Company (par value $25 each), the sum of $60.37 in cash and $77.80 in principal amount of the Collateral Trust Bonds of the New Company of the 5% Series, due 1937;

(b) For each such share of the stock of the Midway Company (par value $100 each), the sum

of $241.48 in cash and $311.22 in principal amount of said Collateral Trust Bonds of the New Company of the 5% Series, due 1937.

The purchase price of the shares of common stock of the Southern Company and the shares of stock of the Midway Company deposited with the Union Bank & Trust Company as aforesaid is as follows:

(x) For each such share of the common stock of the Southern Company (par value $25 each), the sum of $77.45 in cash and $60.05 in principal amount of said Collateral Trust Bonds, 5% Series, due 1937;

(y) For each such share of the stock of the Midway Company (par value $100 each), the sum of $309.80 in cash and $240.20 in principal amount of said Collateral Trust Bonds 5% Series, due 1937.

The cash payments above mentioned on account of the purchase of said stocks of the Southern Company and the Midway Company shall be subject to proper adjustment of the accrued dividends on the stock of the Southern Company and the stock of the Midway Company and the accrued interest on the Collateral Trust Bonds of the New Company, adjusted as of the date of the consummation of the purchase.

V.

The purchase price of the shares of common stock of the [41] Southern Company and the stock of the Midway Company to be sold hereunder will be paid by the New Company against the delivery

to the New Company of the certificates representing the shares of the Southern Company and the Midway Company to be sold hereunder, properly endorsed and stamped for transfer, at such bank or trust company in the City of Montreal, Canada, as the Shareholders shall designate, the cash portion of such purchase price to be paid in New York funds or exchange, in respect of the Shareholders to or upon their respective orders, and in respect of the depositing stockholders to or upon the order of the Depositary; and the bond portion of such purchase price, in respect of the Shareholders in bonds aggregating in principal amount the bonds to which all the Shareholders are entitled in such permissible denominations and to such person as they shall designate, and in respect of the depositing stockholders in bonds aggregating the principal amount the bonds to which all the depositing stockholders are entitled in such permissible denominations and to such person as the Depositary shall designate.

The delivery and payment fo such shares by the New Company shall be made as nearly simultaneously as may be with the payment by the Bankers for the stock of the New Company, and shall be made on such date, not later in any event than December 1, 1927, as shall be designated in a ten days' written notice from the Bankers to the Shareholders. Such notice shall be delivered to the Shareholders in Montreal, Canada, and delivery at the office of

Mr. Lawrence Macfarlane, Royal Trust Building, Montreal, Canada, shall be deemed due delivery.

VI.

The Shareholders agree that they will, after the consummation of this agreement, cooperate with the Bankers to effect such changes in [42] the personnel of the directors and officers of the Southern Company and the Midway Company as the Bankers may desire.

VII.

All legal matters arising in connection with the form of any documents, the authorization and execution thereof, the issuance of any securities, the sufficiency of any orders, resolutions or approvals of the Railroad Commission of the State of California and all other legal matters arising under any of the provisions of this agreement are to be subject to the approval of Messrs. Rushmore, Bisbee & Stern, as counsel for the Bankers, and Messrs. Taylor, Blanc, Capron & Marsh, attorneys for the Shareholders.

VIII.

It is understood that, pending the consummation of this agreement, the Southern Company and the Midway Company will not declare or pay dividends or make any other distribution to their stockholders, except for regular preferred dividends, dividends on the common stock of the Midway Company at 20% per annum and on the common stock of the Southern Company at 12% per annum and will not

engage in any extraordinary transactions not contemplated hereby unless approved by the Bankers.

IN WITNESS WHEREOF, CHASE SECURITIES CORPORATION, STONE & WEBSTER, INC., HUNTER, DULIN & CO. and PYNCHON & CO. and the subscribing Shareholders, and each of them, have caused this agreement to be duly executed, all as of the day and year first above written, at Montreal, Canaada.

(The Bankers)

CHASE SECURITIES CORPORATION,
STONE & WEBSTER, INC.,
HUNTER, DULIN & CO. [43]
PYNCHON & CO.
By C. F. BATCHELDER, Attorney in Fact.

(The Shareholders)

MERIDIAN LIMITED
By A. K. HUGGESEN, President.
and JAMES B. TAYLOR,
Assistant Secretary.

RAYBEN LIMITED
By A. K. HUGGESEN, President
and JAMES B. TAYLOR,
Assistant Secretary

KERCKHOFF LIMITED
By A. K. HUGGESEN, President
and JAMES B. TAYLOR,
Assistant Secretary

LEK SECURITIES COMPANY LIMITED
By A. K. HUGGESEN, President
and JAMES B. TAYLOR,
Assistant Secretary

OHIO INVESTMENTS LIMITED
By A. K. HUGGESEN, President
and JAMES B. TAYLOR,
Assistant Secretary
SAN ANTONIO LIMITED
By A. K. HUGGESEN, President
and JAMES B. TAYLOR,
Assistant Secretary
SAN MARINO LIMITED
By A. K. HUGGESEN, President
and JAMES B. TAYLOR,
Assistant Secretary [44]

EXHIBIT "B"

AGREEMENT, dated November 17, 1927, between the Canadian Corporations whose names are subscribed hereto under the designation, and who are hereinafter called, THE SHAREHOLDERS, parties of the first part: CHASE SECURITIES CORPORATION, a corporation of the State of New York, STONE & WEBSTER, INC., a corporation, of the Commonwealth of Massachusetts, HUNTER, DULIN & CO., a corporation of the State of California, and PYNCHON & CO., a copartnership, herein collectively called THE BANKERS, parties of the second part; and SOUTHERN CALIFORNIA GAS CORPORATION, a corporation of the State of Delaware, hereinafter called the DELAWARE CORPORATION, party of the third part, WITNESSETH:

WHEREAS, the Bankers and the shareholders have heretofore, at Montreal, Canada, entered into

three agreements all dated October 17, 1927 (the first named being hereinafter referred to as the principal agreement and the others as supplemental agreements), as follows: (a) agreement between the Bankers and all of the Shareholders contemplating the organization of a New Company to acquire common stock of Southern California Gas Company and stock of Midway Gas Company; (b) agreement between the Bankers and Meridian Limited, Kerckhoff Limited and San Marino Limited relating to the acquisition by such New Company of share of stock of Producers Gas & Fuel Company; and (c) agreement between the Bankers and Meridian Limited, Rayben Limited and Kerckhoff Limited relating to the acquisition by such New Company of one-half of the stock of Ventura Fuel Company; and

WHEREAS, the Delaware corporation has been incorporated under the laws of the State of Delaware and has entered into an agreement with the Bankers to take over and carry out the obligations performable by the New Company under the principal and supplemental agreements; and

WHEREAS the Bankers have purchased or caused to be purchased 75,000 shares of $6.50 Cumulative Dividend Preferred Stock and 600,000 shares of Common Stock of the Delaware Corporation without nominal or par value and there had been paid in therefor the sum of $18,600,000; and

WHEREAS the Shareholders and their counsel approve the organization of the Delaware Corporation as such New Company; and

WHEREAS the recitals in the principal agreement as to the respective numbers of shares of stock of Southern California Gas Company and Midway Gas Company owned or controlled by the Shareholders and deposited with Union Bank & Trust Co. of Los Angeles as Depositary under the deposit agreements referred to in the principal agreement should be corrected, the proper amounts as of the date hereof being as follows:

	Southern California Gas Company Common Stock Shares	Midway Gas Company Capital Stock Shares
Owned or controlled by Shareholders	229,744	15,554
Deposited with Union Bank & Trust Co. of Los Angeles	9,864	7,567
		[45]
Undeposited Stock	392	143
Total	240,000 shares	23,264 shares

NOW, THEREFORE, in consideration of the premises and of the mutual covenants hereinafter set forth, IT IS AGREED AND PROVIDED AS FOLLOWS:

1. The Bankers hereby transfer and assign unto the Delaware Corporation all of their rights to acquire shares of stock under the principal agreement and supplemental agreements, and the Shareholders consent to such assignment and hereby recognize the Delaware Corporation as the New Company provided for in the principal agreement and supplemental agreements.

2. The parties hereto agree that the purchase of and payment for the shares of stock owned and controlled by the Shareholders and for the shares of stock deposited with said Union Bank & Trust Co. of Los Angeles as above recited be consummated forthwith.

3. Paragraphs (a) and (b) of Division IV of the principal agreement are hereby amended to read as follows:

> "(a) For shares of the common stock of the Southern Company (par value $25 each), at the rate of $60.97675 per share in cash and $77.1755 per share in principal amount of the Collateral Trust Bonds of the New Company of the 5% Series due 1937;
>
> "(b) For shares of the stock of the Midway Company (par value $100 each), at the rate of $243.907 per share in cash and $308.702 per share in principal amount of said collateral Trust Bonds of the New Company of the 5% Series due 1937."

4. The parties hereto approve the attached Exhibit A, setting forth the amount of the bonds to be issued and cash to be paid, after giving effect to adjustments for fractional interests and for accrued interest and accrued dividends; and the Shareholders hereby authorize and direct the Delaware Corporation to make payments of such cash in New York Funds, and to deliver the Collateral Trust Bonds, to the persons and in the amounts respectively indicated in said Exhibit A.

IN WITNESS WHEREOF, Chase Securities Corporation, Stone & Webster, Inc., Hunter, Dulin & Co., and Pynchon & Co., and the subscribing Shareholders and each of them, and the Delaware Corporation, have caused this agreement to be duly executed all as of the day and year first above written, at Montreal, Canada.

(The Bankers)

CHASE SECURITIES CORPORATION
STONE & WEBSTER, INC.

[46]

HUNTER, DULIN & CO.
PYNCHON & CO.
By CHASE SECURITIES
CORPORATION
By CHARLES F. BATCHELDER
Assistant Vice President
Syndicate Manager

(The Delaware Corporation)

SOUTHERN CALIFORNIA GAS
CORPORATION
By STEPHEN A. VAN NESS,
Vice President

[Corporate Seal]

Attest:
CHARLES F. BATCHELDER,
Assistant Secretary. [47]

(The Shareholders)

MERIDIAN LIMITED
By A. C. BALCH, Vice President

[Corporate Seal]

and JAMES B. TAYLOR,
Assistant Secretary

RAYBEN LIMITED
By BEN R. MEYER, Vice President
[Corporate Seal]
and JAMES B. TAYLOR,
Assistant Secretary
KERCKHOFF LIMITED
By G. C. YOUNG, Vice-President
[Corporate Seal]
and H. KRESSMAN, Secretary
LEK SECURITIES COMPANY LIMITED
By G. C. YOUNG, Vice President
[Corporate Seal]
and H. KRESSMANN, Secretary
OHIO INVESTMENTS LIMITED
By G. C. YOUNG, Vice President
[Corporate Seal]
and H. KRESSMANN, Secretary
SAN ANTONIO LIMITED
By G. C. YOUNG, Vice President
[Corporate Seal]
and H. KRESSMANN, Secretary
SAN MARINO LIMITED
By G. C. YOUNG, Vice President
[Corporate Seal]
and H. KRESSMANN, Secretary [48]

The foregoing evidence is all of the evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned,

John C. Altman, as attorney for Philip N. Lilienthal, petitioner.

JOHN C. ALTMAN,
Attorney for Petitioner.

The foregoing evidence is all of the evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, as attorney for respondent.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: Approved and Ordered Filed this 12 day of Feb., 1935.

(Sgd) LOGAN MORRIS,
Member.

[Endorsed]: U. S. Board of Tax Appeals. Lodged Feb. 11, 1935.

[Endorsed]: U. S. Board of Tax Appeals. Filed Feb. 12, 1935. [49]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of

Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by Philip N. Lilienthal, Petitioner:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board.
   (a) Petition including annexed copy of deficiency letter.
   (b) Answer.
3. Opinion and decision of the Board. [50]
4. Petition for review, together with proof of service of notice of filing petition for review.
5. Statement of the evidence as settled and allowed.
6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record. (Not included in record)
7. This praecipe, together with proof of notice of filing praecipe and of service of a copy of praecipe.

(Signed) JOHN C. ALTMAN,
Attorney for Petitioner.

Service of a copy of the within praecipe is hereby admitted this 26th day of January, 1935.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for Bureau of Internal Revenue.

[Endorsed]: U. S. Board of Tax Appeals. Filed Feb. 11, 1935. [51]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 51, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 26th day of February, 1935.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7788. United States Circuit Court of Appeals for the Ninth Circuit. Philip N. Lilienthal, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed March 4, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7788

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHILIP N. LILIENTHAL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

BRIEF FOR PETITIONER.

JOHN C. ALTMAN,
RICHARD S. GOLDMAN,
Russ Building, San Francisco,
Attorneys for Petitioner.

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No. 7788

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHILIP N. LILIENTHAL,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

BRIEF FOR PETITIONER.

OPINION BELOW.

The only previous opinion is the unreported memorandum opinion of the United States Board of Tax Appeals (R. 16-23).

JURISDICTION.

This appeal involves an alleged deficiency of $38,107.54 of income taxes for the year 1927, and is taken from a decision of the United States Board of Tax Appeals entered September 29, 1934 (R. 24). The office of the Collector of Internal Revenue, to whom petitioner made his return, is at San Francisco, Cali-

fornia, which is within the Ninth Circuit of the Circuit Court of Appeals. Petitioner is a resident of that circuit. Appellate jurisdiction is conferred upon this Court by Sections 1001-1003 of the Revenue Act of 1926.

QUESTION PRESENTED.

I. Does the acquisition by one corporation of a majority of the voting stock (there being no non-voting stock) of another corporation constitute a "reorganization" within the purview of Section 203 (h) (1) of the Revenue Act of 1926?

STATUTES AND REGULATIONS INVOLVED.

Section 203, Revenue Act of 1926:

> "Sec. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.
>
> * * * * * * *
>
> (b) (2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.
>
> * * * * * * *
>
> (d) (1) If an exchange would be within the provisions of paragraph (1), (2), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only

of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

* * * * * * *

(h) (1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), * * *

(h) (2) The term 'a party to a reorganization' * * * includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

Treasury Regulations 69:

"Art. 1574. **Exchanges in connection with corporate reorganizations.** * * * no gain or loss shall be recognized if, in pursuance of a plan of reorganization, stock or securities in a corporation a party to a reorganization are exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization * * * If two or more corporations reorganize, for example, by— * * *

(6) The acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, * * * then

no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock or securities of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B."

"Art. 1575. **Exchanges in reorganizations for stock or securities and other property or money.** —If stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged for stock or securities in such corporation or in another corporation a party to the reorganization and other property or money, the gain, if any, to the recipient will be recognized in an amount not in excess of the sum of the money and the fair market value of the other property."

STATEMENT OF FACTS.

The entire evidence submitted to the Board was in the form of a stipulation of facts, which is set out in the record (R. 31-54).

In so far as necessary for a determination of the issue involved, the controlling facts may be summarized as follows:

During the year 1927 two companies existed, viz., Southern California Gas Company (hereinafter for convenience called "Old Southern") and Midway Gas Company. Midway was principally engaged in

purchasing natural gas in the oil fields and transporting and selling it to distributing companies. Old Southern was engaged in distributing natural and artificial gas to consumers and purchased the bulk of the output of Midway.

In October, 1927, an agreement was executed between a banking syndicate and the controlling stockholders of Old Southern and Midway, providing for the organization of a new corporation, which should acquire all of the capital stock of Midway and a majority of the outstanding stock of Old Southern in exchange for cash and bonds of the new corporation. The bonds were to be secured by the shares of stock of Midway and Old Southern to be acquired. As part of the plan, Old Southern was to acquire the property and business of Midway and thereafter Old Southern was to conduct the business formerly carried on both by it and Midway.

The agreement and plan of exchange were carried out as contemplated and pursuant thereto in November, 1927, Southern California Gas Corporation (hereinafter designated as New Southern) issued and delivered its bonds and cash in exchange for shares of stock of Old Southern and Midway.

Ruth H. Lilienthal, wife of petitioner, being the owner of certain shares of stock of Old Southern, exchanged such shares in November, 1927, for cash and bonds of New Southern—all pursuant to the agreement and plan referred to. Petitioner and his wife, having filed a joint income tax return for the year 1927, reported therein a profit on the exchange to the extent of the cash received, but treated the bonds of

New Southern as having been received in a non-realizing transaction, to-wit, in connection with a reorganization as defined by the taxing statute. Respondent, however, held that there had not been a statutory reorganization and accordingly increased the profit by an amount representing the excess of the fair market value of the bonds received over the cost to Mrs. Lilienthal of the shares of Old Southern which had been exchanged. This action on the part of the Commissioner gives rise to the entire deficiency.

From respondent's determination, petitioner prosecuted an appeal to the Board of Tax Appeals, where respondent's determination was affirmed. Feeling aggrieved at the decision of the Board, petitioner has brought the case to this Court for review.

ARGUMENT.

If the statute and the regulations applicable to the transaction here involved can be regarded as meaning what they say, then it inevitably follows that the taxable gain upon the exchange is limited to the amount of cash received. We have here a literal compliance with the taxing statute, because:

1. A reorganization was effected by virtue of the fact that New Southern acquired a majority of the voting stock (there being but one class of stock, that is, voting stock) of Old Southern (Section 203, Revenue Act of 1926, and Article 1577, Regulations 69).

2. Both New Southern and Old Southern were parties to the reorganization by virtue of the acqui-

sition by the former of more than a majority of the voting stock of the latter (Section 203 (h) (2), Article 1577, Regulations 69).

3. Petitioner's wife exchanged stock in Old Southern for securities (bonds) in New Southern and cash, and such exchange was in pursuance of the plan of reorganization as outlined by the various agreements between the parties, which are in the record (Section 203 (b) (2) and (d) (1), Revenue Act of 1926, and Article 1574-5, Regulations 69).

The applicable provisions of the Revenue Act of 1926 had their exact counterparts in the Revenue Acts of 1921 and 1924, and continuous administrative construction has given to these provisions the meaning contended for herein. Article 1566 of Regulations 62 (1921 Act); Articles 1574 and 1577 of Regulations 65 (1924 Act). As a matter of fact, even up to the present time, the Treasury Department has not amended or changed its regulations appertaining to the Revenue Acts of 1921, 1924 or 1926, in so far as the subject matter here involved is concerned. From 1921 to 1933, it was uniformly regarded by taxpayers and the Treasury Department alike that a reorganization within the meaning of the taxing statute, was effected when there had been compliance with the words of the statute, viz., the acquisition by one corporation of a majority of the voting stock and a majority of all other classes of stock of another corporation.

Despite the clear and unambiguous language of the taxing statute and the settled administrative construction which, if followed, should have compelled a

decision in favor of petitioner by the Board of Tax Appeals, the Board rendered its decision in favor of respondent. In so doing the Board relied entirely upon a patently erroneous interpretation of the taxing statute—an interpretation placed upon the statute by the Board itself in two decisions rendered in the year 1933. (*Watts v. Commissioner,* 28 B. T. A. 1056, and *Minnesota Tea Company v. Commissioner,* 28 B. T. A. 591). However, this new interpretation of the taxing statute by the Board was flatly rejected by the Circuit Court of Appeals for the Second and Eighth Circuits, where the decisions of the Board in the *Watts* and *Minnesota Tea* cases were reversed. *Such reversals were handed down subsequent to the decision of the Board in the instant case.*

In the *Watts* and *Minnesota Tea* cases the Board held that the acquisition by one corporation of a majority of the voting stock and of all other classes of stock of another corporation or the acquisition by one corporation of substantially all of the properties of another corporation did not *per se* constitute a "reorganization" within the meaning of the taxing statute. The Board held that the transaction must

> "be part of a strict merger or consolidation or of something which partakes of the nature of a merger or consolidation and has a real semblance to a merger or consolidation and involves a continuance of essentially the same interests through a modified corporate structure."
>
> *Minnesota Tea Co. v. Commissioner,* supra.

Speaking specifically, the Board of Tax Appeals in the cases alluded to above, held that in addition to

compliance with the provisions of the statute, there must be (1) a dissolution of the corporation whose assets or shares of stock have been acquired by a second corporation, and (2) there must be a continuity of stockholders' interest from the old corporation into the new.

In *Rippell & Co. v. Commissioner*, 30 B. T. A., page 1146, the identical facts and issue presented here were involved, namely, the question as to whether the acquisition by New Southern of a majority of the stock of Old Southern constituted a reorganization. In holding that such acquisition did not constitute a reorganization, the Board relied solely upon its decisions in the *Watts* and *Minnesota Tea* cases, stating:

> "What occurred in this case was in fact merely a change in the ownership of a majority of the voting capital stock of the Gas Co. A partial or even complete change of stock ownership does not constitute a statutory reorganization. There was no transfer of assets, followed by a continuity of interest under a new or modified corporate structure; nor was there a merger or consolidation, or anything in the nature thereof, which effected such continuity of interest through an exchange of stock for stock. * * *
>
> In the case at bar there was no continuity of stockholders' interests from the old corporation into the new; there was no change in the form of corporate ownership through which the interests of the old stockholders were continued in the same property. The new corporation merely purchased for cash and bonds approximately 60 per cent of the voting stock of the old corpora-

tion, which latter company 'continued its corporate existence and operations in exactly the same manner as prior thereto, unaffected and without modification in any way as a result of the change in the ownership of its common capital stock.'

If the old corporation had exchanged all of its assets for stock of the new corporation, and if the old corporation had thereupon distributed the stock so received among its stockholders in liquidation, the transaction would have amounted to a reorganization, within the meaning of the statute. Cf. Minnesota Tea Co., 28 B. T. A. 591, 596. But this was not done. A wholly different situation is presented, which in our opinion falls short of constituting a statutory reorganization."

In rendering its decision in the instant case, the Board simply cited its decision in *Rippell v. Commissioner,* supra.

That the Board of Tax Appeals was in error in attempting to read into the taxing statute something which did not exist is demonstrated not only by the long standing prior administrative and judicial construction of the statute, but also by the fact that the Circuit Court of Appeals for the Second and Eighth Circuits, respectively, reversed the decisions of the Board in the *Watts* and *Minnesota Tea* cases in the early part of this year. *However, as pointed out above, at the time of the rendition of the opinions of the Board, both in the Rippell case and in the instant case, neither of the decisions of the Circuit Court in the Watts or Minnesota Tea cases had been handed down.*

In *Watts v. Commissioner,* 75 Fed. (2d) 981 (C. C. A. 2), the facts were as follows: Three persons owning all of the stock of Alloys exchanged their stock for stock of Vanadium and for mortgage bonds of Alloys, which were guaranteed by Vanadium. Alloys continued in business for a number of years after the exchange in the same manner as it had done in the past and the Board of Tax Appeals held that since there was no dissolution of Alloys, the transaction did not partake of the nature of a merger or consolidation, and therefore no reorganization existed. In reversing the Board, the Circuit Court of Appeals said:

> "Sec. 203 (b) (2) of the Revenue Act of 1924 provided that: 'No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.'
>
> And Sec. 203 (h) of the same statute provided so far as here applicable that:
>
> '(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, * * *).'
>
> Art. 1574 of T. R. 65, in so far as pertinent to the present problem, provided that under the law above noted '* * * no gain or loss shall be recognized to the shareholders from the exchange of stock made in connection with the reorganization * * *. If two or more corporations reorganize, for example, by either * * *

(3) the sale of the stock of B to A, or * * * (6) the acquisition by A of a majority of the total number of shares of all other classes of stock of B. * * *'

Since the transaction here involved is one that verbally falls within the concept of 'reorganization' as shown by the regulation (as all of the stock of Alloys went to Vanadium, either subdivision (3) or (6) covers the transaction) the real issue is simply whether the regulation has unlawfully broadened the statutory definition of 'reorganization'. The plan of reorganization was the contract made and performed.

In the above statute it will be seen that reorganization was defined to be a merger or consolidation, with those terms somewhat expanded by matter in parentheses 'so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation.' *Pinellas Ice & Cold Storage v. Commissioner,* 287 U. S. 462, 470. In *Cortland Specialty Co. v. Commissioner,* 60 Fed. (2) 937, we had before us the taxable effect under the similar Sec. 203 (h) (1) of the Revenue Act of 1926 of a sale of the assets of a corporation for cash and short term notes and held that the gain from the transaction was not tax free. In that connection we discussed merger and consolidation generally in their relation to a reorganization within the meaning of the statute but the facts there did not present the issue now before us. And in *C. H. Mead Coal Co. v. Commissioner,* 72 Fed. (2) 22, while the precise question here was not involved, the necessity for giv-

ing a liberal scope to the words 'merger' and 'consolidation' as used in the statute, which, as already noticed, was in respects now essential like the statute controlling here, was recognized.

We think the legislative history of the statute requires its interpretation in a way which shows that the Board in this instance was in error in sustaining the deficiencies. It was divided in opinion, with the majority taking the view that there was no 'reorganization' while there was no dissolution of Alloys.

In the Revenue Act of 1918, Congress for the first time dealt with the effect of reorganization upon taxation and provided in Sec. 202 (b) that '* * * when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange * * *.'

The terms 'reorganization', 'merger', and 'consolidation' were left without especial definition for the purposes of the statute, and the Treasury Department promulgated Regulations 45, which required in such a situation as that before us the dissolution of the corporation whose stock was acquired by another corporation as a condition precedent to sustaining the claim of freedom from taxation which the petitioners make. In 1921, however, Congress saw fit to change the statute and then included in Sec. 202 (c) (2) of the 1921 Act the same statutory definition of reorganization which was carried into the 1924 Act and is effective here. The term 'reorganization' was the subject of some controversy between the House and the Senate but this was resolved

as is shown by the report of the Conference Committee which stated:

> 'The Senate amendment adds to this definition the case where one corporation acquires at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation; * * *; and the House recedes.' Conf. Rep. No. 486, 67th Congress 1st Session, p. 17 and 18.

After the 1921 Act went into effect the Treasury Department promulgated regulations which differed from those under the 1918 Act. The language found both in subdivision (3) and in (6) of T. R. 65; Art. 1574, above quoted, was used to define a reorganization. T. R. 62; Art. 1566 (b). It will thus be seen that the regulations no longer required a dissolution of the corporation whose stock was acquired in order to entitle persons in the situation of these petitioners to make such an exchange on a tax-free basis.

In 1924 Congress enacted the statute under which these deficiencies were assessed, and then had under consideration whether Art. 1566 of T. R. 62, in providing that in the case of a reorganization no gain or loss should be recognized to the corporations as well as to the stockholders, had, in putting the corporations in a reorganization on the same basis with stockholders, gone beyond the scope of the 1921 Act. It was proposed to resolve this difficulty by changing the statute so as to eliminate all doubt about the validity of the regulations in this respect. The Senate Committee reported on the subject that:

> 'There is no corresponding provision of the existing law, although this paragraph embodies

the construction placed by the Treasury Department upon the existing law. The present ruling of the Treasury Department is of doubtful legality and a statutory provision is most necessary.' Sen. Rep. No. 398, 68th Congress, 1st Session, p. 14 and 15.

This proposed change was made. Nevertheless, the definition of reorganization as it had been in Sec. 202 (c) of the 1921 Act was reenacted without material change in Sec. 203 (h) (1) in the 1924 Act. Under well established principles of construction, this reenactment of the definition of reorganization after it had been interpreted by regulation is strong evidence that Congress intended Sec. 203 (h) (1) to include within the meaning of the word as there defined such an exchange of stock for stock and bonds as these petitioners made. *Zellerbach Paper Co. v. Helvering,* 293 U. S. 172; *United States v. Dakota-Montana Oil Co.,* 288 U. S. 459; *Norwegian Nitrogen Co. v. United States,* 288 U. S. 294; *Constanzo v. Tillinghast,* 287 U. S. 341; *McCaughn v. Hershey Chocolate Co.,* 283 U. S. 488; *Shearman v. Commissioner,* 66 Fed. (2) 256. In our opinion, therefore, subdivisions (3) and (6) of Art. 1574 of T. R. 65 are valid and either makes it impossible to affirm the decision of the Board of Tax Appeals sustaining the deficiencies determined in the case of each of these petitioners. Having had the opportunity, it is to be presumed that if Congress had intended, contrary to the regulation in force, to have the gain from such an exchange as this be tax free only when there was a dissolution of one of the corporations or some other change in the corporate structure such as would commonly take place in a merger or consolidation, strictly speaking, it would have

> said so. The fact that it changed a related part of the statute to remove any doubt as to the validity of a regulation and at the same time reenacted the part which had been construed by the regulation which governs here shows an adoption of such construction. *National Lead Co. v. United States,* 252 U. S. 140; *United States v. Cerecedo Hermanos y Compania,* 209 U. S. 337; *Francisco Sugar Co. v. Commissioner,* 47 Fed. (2) 555."

The *Watts* case specifically holds that where a corporation acquires at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, a "reorganization" has been effected within the meaning of the taxing statute and each of the corporations is "a party to a reorganization".

Such a holding fits the exact facts of the instant case and is determinative of the issue involved herein.

Cf. also *Minnesota Tea Co. v. Commissioner,* 76 Fed. (2d) 797 (C. C. A. 8), where it was held that the acquisition by one corporation of substantially all of the properties of another corporation constituted a "reorganization" within the purview of Section 203 (h) (1) of the Revenue Act of 1926. In reversing the decision of the Board of Tax Appeals, the Circuit Court of Appeals in the *Minnesota Tea Co.* case pointed out that the Courts may not read into a statute additional conditions not therein expressed; that neither dissolution nor a continuance of the same actual ownership of substantially the same properties was required to effect a reorganization under the taxing statute; that long settled ad-

ministrative construction given to the reorganization provisions by the Treasury Department could not be lightly ignored and that it is to be presumed that Congress in reenacting the reorganization provisions of the 1921 Act in the 1924 and 1926 Revenue Acts, had in mind the construction placed upon the prior statutes. As further authority for its conclusion, the Circuit Court of Appeals relied upon the decision of the Second Circuit in *Watts v. Commissioner,* supra.

In fairness to respondent, it should be pointed out that he has docketed in the Supreme Court a petition for a writ of certiorari in each of the two cases alluded to, viz., the *Watts* and *Minnesota Tea* cases. The Supreme Court has not as yet acted upon either of the petitions. If certiorari should be granted, the decision of the Supreme Court in those cases would effectively dispose of the issue herein, and if certiorari be denied, then this Court should follow the promulgated regulations and unbroken line of decisions of Circuit Courts of Appeals in other jurisdictions and reverse the judgment of deficiency rendered against petitioner herein.

Dated, San Francisco,
September 27, 1935.

Respectfully submitted,
JOHN C. ALTMAN,
RICHARD S. GOLDMAN,
Attorneys for Petitioner.

No. 7788

In the United States Circuit Court of Appeals for the Ninth Circuit

PHILIP N. LILIENTHAL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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MAURICE J. MAHONEY,
Special Assistants to the Attorney General.

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OPINION BELOW

The only previous opinion in this case is the unreported memorandum opinion of the Board of Tax Appeals (R. 16–23).

JURISDICTION

This appeal involves a deficiency of income tax for 1927 in the amount of $38,107.54, and is taken from a decision of the Board of Tax Appeals entered September 29, 1934 (R. 24). The case is brought to this Court by petition for review filed December 17, 1934 (R. 24–30), pursuant to the provisions of Sections 1001–1003 of the Revenue Act

of 1926, c. 27, 44 Stat. 9, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTIONS PRESENTED

1. Where one corporation acquired in excess of 60 percent of the outstanding capital stock of another corporation in exchange for cash and bonds (but no stock), and the latter corporation was not dissolved but continued to operate its business without modification in any way, did the transaction constitute a "reorganization" within the meaning of Section 203 (h) (1) (A) of the Revenue Act of 1926?

2. Assuming that the transaction was a reorganization within the meaning of Section 203 (h) (1) (A) of the Revenue Act of 1926, should the gain realized from the transaction by the taxpayer be recognized to the extent of the fair market value of the bonds received, namely, $312,340, under Section 203 (d) (1) of the Revenue Act of 1924? This depends upon whether the bonds are "securities" within the meaning of Section 203 (b) (2) of the said Act.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 31–36.

STATEMENT

The facts, as found by the Board of Tax Appeals and adopted from a stipulation before it, are as follows (R. 17–23):

The petitioner is an individual, with his place of business at San Francisco, California, and with his residence at Burlingame, California.

During the entire calendar year 1927 petitioner and Ruth H. Lilienthal were, and continuously since said last-mentioned date have been, husband and wife and living together as such.

Pursuant to the provisions of Section 223, subdivision (b) of the Revenue Act of 1926, petitioner and said Ruth H. Lilienthal elected to make a single joint income-tax return for the calendar year 1927, and in accordance with such election, petitioner, on or about the 14th day of March 1928, filed with the Collector of Internal Revenue at San Francisco, California, a single joint income-tax return for the calendar year 1927, wherein there was reported and included the income of petitioner and of said Ruth H. Lilienthal, his wife, for such calendar year 1927.

Continuously from August 1921, to November 1926, said Ruth H. Lilienthal was the owner of 1,100 shares of the common stock of Southern California Gas Company having a par value of $100 per share. In November 1926, she, in a nontaxable exchange, for said 1,100 shares, received, 4,400 shares of the common stock of said Southern California Gas Company having a par value of $25 per share, and continuously owned said 4,400 shares to November 17, 1927. Said 4,400 shares had a cost basis of $16,500.

In the year 1927 there were two existing corporations, Southern California Gas Company and Midway Gas Company, which were incorporated under the laws of the State of California, on October 5, 1910, and November 11, 1911, respectively.

The Southern California Gas Company was principally engaged in distributing natural and artificial gas to retail and industrial consumers. The Midway Gas Company was principally engaged in purchasing natural gas in the oil fields, transporting it to cities and selling it to distributing companies. Midway sold the bulk of its gas to Southern California Gas Company.

Under date of October 17, 1927, an agreement was entered into between some of the larger stockholders of the Southern California Gas Company and the Midway Gas Company and a Syndicate of Bankers composed of Chase Securities Corporation, Stone and Webster, Hunter, Dulin and Company, and Pynchon and Company, which agreement provided, among other things, that (1) the Southern California Gas Company was to acquire the properties and business of the Midway Gas Company for capital stock and bonds of the Southern California Gas Company, and (2) for the organization of a new corporation which was to acquire all or practically all of the common stock of the Southern California Gas Company and all of the capital stock of the Midway Gas Company for cash and bonds of the contemplated new company.

On October 4, 1927, the Midway Gas Company adopted resolutions authorizing the sale of its properties and business to the Southern California Gas Company. Said resolution provided that it was the plan of the board of directors that "said common capital stock and said bonds of the Southern California Gas Company to be received for Midway Gas Company assets shall be distributed to the stockholders of this corporation when, as, and if received by this corporation and as soon as such distribution may lawfully be made."

On October 17, 1927, the Southern California Gas Company had issued and outstanding 240,000 shares of common stock of a par value of $25 a share, and 182,226 shares of preferred stock of a par value of $25 a share. Both classes of stock had equal share-voting rights. On said date the Midway Gas Company had issued and outstanding 23,264 shares of capital stock of a par value of $100 a share, all fully voting common stock.

On October 31, 1927, the Southern California Gas Company acquired all of the properties and business of the Midway Gas Company as of August 31, 1927, in consideration of a new issue of 80,000 shares of its capital stock of a par value of $25 a share and $2,942,000 face value of a new issue of bonds of said Southern California Gas Company due in 1957, and the assumption of Midway Gas Company's liabilities. Immediately after this transaction and throughout the remainder of 1927,

the Southern California Gas Company had outstanding 320,000 shares of common capital stock, and 182,226 shares of voting preferred stock.

In accordance with the terms of the agreement of October 17, 1927, a new corporation, the Southern California Gas Corporation, was organized under the laws of the State of Delaware on November 12, 1927. Said corporation had an authorized capital stock of $16,500,000 consisting of $7,500,000 preferred and $9,000,000 common, all of which was issued and outstanding on November 17, 1927. Under date of November 17, 1927, the Southern California Gas Corporation acquired under the provisions of the contracts of October 17 and November 17, 1927, and certain deposit agreements referred to in said contracts, 23,121 shares out of a total of 23,264 shares of capital stock of the Midway Gas Company, and 239,608 shares out of a total of 320,000 shares of the outstanding common stock of the Southern California Gas Company, for cash and bonds of the said Southern California Gas Corporation.

The Southern California Gas Corporation issued, on November 17, 1927, for the said shares of stock of Midway Gas Company and Southern California Gas Company, bonds having a par value of $24,942,000. Virtually all of the remaining $58,000 face value of bonds of that issue were subsequently issued in the acquisition of the remaining common stocks of the two said companies. The stocks of

Southern California Gas Company and Midway Gas Company, acquired by Southern California Gas Corporation, as herein set forth, were deposited with a trustee as collateral for the bonds issued as partial consideration therefor.

On November 17, 1927, the board of directors of Midway Gas Company declared a dividend of $2,942,000, and paid the same in Temporary Certificates of the First Mortgage and Refunding Gold Bonds, 5%, due 1957, of Southern California Gas Company.

These bonds were sold on November 17, 1927, at 95, and the proceeds therefrom were used by the Southern California Gas Corporation of Delaware in the acquisition of the stock of Midway Gas Company and of Southern California Gas Company, as aforesaid.

On December 10, 1927, Midway Gas Company distributed the 80,000 shares of common stock of the Southern California Gas Company to its stockholders, one of whom was Southern California Gas Corporation, which received, as such stockholder, 79,508 of the 80,000 shares of the common stock of Southern California Gas Company.

Midway Gas Company did no business thereafter, but retained its charter until March 21, 1934, for the purpose of settling its prior years income taxes.

After the acquisition of the 319,116 shares of the common stock of the Southern California Gas Com-

pany by the Southern California Gas Corporation, as aforesaid, the Southern California Gas Company continued, and still does continue, its corporate existence. Its operations were enlarged as it then had the gas-gathering and transporting assets formerly owned by Midway Gas Company. There were some changes in its directorate and management.

Pursuant to the agreement of October 17, 1927, as modified by an agreement dated November 17, 1927, said Ruth H. Lilienthal received for her 4,400 shares of common stock of Southern California Gas Company, $260,609.12 cash and bonds of Southern California Gas Corporation of the par value of $339,500 and of the fair market value of $312,340.

The $260,609.12 was the amount of cash payable to said Ruth H. Lilienthal (including proceeds of sale of a fractional bond), after deducting $1.375 per share brokerage commissions, and her share of other expenses of carrying out the transactions.

The petitioner reported in his single joint income-tax return for the calendar year 1927, a profit of $260,609.12, being the amount of cash received by said Ruth H. Lilienthal. Said Ruth H. Lilianthal did not, in 1927, sell or otherwise dispose of the bonds of Southern California Gas Corporation received for her stock.

The respondent adjusted said Ruth H. Lilienthal's income for 1927, by increasing the same in the amount of $295,840, representing the fair-

market value of the bonds received, after deducting from such fair-market value the sum of $16,500, representing the cost to said Ruth H. Lilienthal of her stock.

The deficiency letter explained the adjustment as follows (R. 13):

> With reference to the exchange of stock of the Southern California Gas Company, it is held that this transaction does not fall within the provisions of Section 203 (d) (1) of the 1926 Act. For the purpose of determining the amount of gain or loss, the total consideration received for the stock disposed of is the fair-market value of the bonds as of the effective date of the transaction, plus the amount received in cash. Capital net gain therefore has been adjusted * * *.

The Board of Tax Appeals sustained the determination of the Commissioner upon the authority of its prior decision in *J. S. Rippel & Co.* v. *Commissioner,* 30 B. T. A. 1146, which involved the identical facts and issue with respect to another stockholder of the Southern California Gas Company. In that case the Board held that there was no reorganization within the meaning of Section 203 (h) (1) of the Revenue Act of 1926, and that, therefore, the gain derived by the petitioner upon the exchange of stock in one corporation for cash and bonds of the other was recognizable for tax purposes to the extent of both cash and bonds so received.

SUMMARY OF ARGUMENT

The transaction here was not a reorganization within the intendment of the statute. The scheme of the statute is to defer the recognition of gain or loss in any case where an exchange results merely in a change of form and not of substance. The present transaction was not strictly a merger, a consolidation, or something in the nature of a merger or consolidation, within the statutory definition. In construing the language of Section 203 (h) (1) of the Revenue Act of 1926, and the same provision of other acts, the Supreme Court and the Circuit Courts of Appeals have decided that the words "merger or consolidation" in Clause A must not be disregarded.

While the parenthetical clause expands the meaning of those words, it is of first importance that the transaction partake of the nature of a merger or consolidation. In the absence of such a showing, mere literal compliance with the language within the parenthesis is insufficient to exempt the gain derived from an exchange like the instant one. The transaction here comes within the parenthetical clause of A, but the circumstances surrounding the transaction show that it does not represent a consolidation or merger in a real sense.

Here, the taxpayer received no stock in exchange for his own stock but only cash and bonds of the purchasing corporation. Bonds, like promissory notes, are the equivalent of cash and do not satisfy the requirement of the statute for some continuity

of interest by the transferor, where other surrounding facts have no resemblance to a merger or consolidation.

The determination of the Commissioner upon the present facts is consistent with the pertinent regulations embodying the administrative construction. Even if it were not, an erroneous administrative construction must yield to the meaning of the statute, as judicially construed.

ARGUMENT

The transaction under which the taxpayer disposed of his stock was not a reorganization within the intendment of the statute, nor were the bonds received "securities" acquired under a nontaxable exchange

Section 203 (a) of the Revenue Act of 1926, *infra,* provides that—

> Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

The transaction here involved was a disposition of property which admittedly produced a profit. There is no controversy with respect to the amount of the profit, the sole question being whether the petitioner is free from taxation on part of it by the exceptions contained in other provisions of Section 203. It is, of course, well settled that one claiming an exemption from tax must bring himself squarely within the provisions of the statute under which he claims such exemption. The rule

is equally applicable to a taxpayer who claims the benefit of exceptional treatment. *Bowers* v. *Lawyers Mortgage Co.,* 285 U. S. 182, 187.

The exemption on which the petitioner relies is contained in Section 203 (b) (2), as modified by Section 203 (d) (1). Section 203 (b) (2) provides that—

> No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

This provision is qualified by Section 203 (d) (1), which provides—

> If an exchange would be within the provisions of paragraph (1), (2), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

The word "reorganization" as used in the section is defined in Section 203 (h) (1) (2) as follows:

> The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a

> majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.
>
> The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

From its terms it is plain that the purpose of the statute was to defer the recognition of gain or loss in any case where an exchange results merely in a change of form and not of substance. A corporate transaction may technically involve a sale or exchange and thus have the elements of a "closed" transaction without changing in substance the real ownership of the property involved. In such a case Congress has provided that no gain or loss shall be then recognized for tax purposes and the tax is postponed.

The decision of the Board of Tax Appeals in the instant case is in accordance with the following authorities and is based upon the principle applied by the courts in these cases: *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462; *Cortland Specialty Co.* v. *Commissioner,* 60 F. (2d) 937 (C. C. A. 2d), certiorari denied, 288 U. S. 599; *Prairie Oil & Gas Co.* v. *Motter,* 66 F. (2d) 309 (C. C. A. 10th); *West Texas Refining & Development Co.* v. *Commissioner,* 68 F. (2d) 77 (C. C. A. 10th); *Von Weise* v. *Commissioner,* 69 F. (2d) 439 (C. C. A. 8th), certiorari denied, 292 U. S. 655; *C. H. Mead Coal Co.* v. *Commissioner,* 72 F. (2d) 22 (C. C. A. 4th); *John A. Nelson Co.* v. *Commissioner,* 75 F. (2d) 696 (C. C. A. 7th); *Worcester Salt Co.* v. *Commissioner,* 75 F. (2d) 251 (C. C. A. 2d), and *G. & K. Mfg. Co.* v. *Commissioner,* 76 F. (2d) 454 (C. C. A. 4th).

The cases of *Watts* v. *Commissioner,* 75 F. (2d) 981 (C. C. A. 2d), and *Minnesota Tea Co.* v. *Commissioner,* 76 F. (2d) 797 (C. C. A. 8th), relied upon by the petitioner, do not require a like result here because the factual basis of both those decisions is lacking in the instant case. In both the *Watts* and *Minnesota Tea Co.* cases the transferors of stock or properties of the corporation received in exchange therefor stock in the transferee corporation in addition to cash or other property. In the instant case the transferor received only cash and bonds of the transferee corporation in exchange for his stock and it is established that such

an exchange does not satisfy the requirement of the statute. Other distinctions between this and the *Watts* and *Minnesota Tea Co.* cases are discussed in greater detail hereinafter.

There is no contention that the facts in this case constitute a reorganization unless they bring the transaction within the scope of subdivision (A) of Section 203 (h) (1), quoted above. The contention here is that since the transferee acquired a majority of the outstanding stock of another corporation the transaction comes within the literal description of the provision and is tax-free. But by the leading case of *Pinellas Ice Co.* v. *Commissioner, supra,* and the above-cited cases following it, it has long been established that such a literal compliance with the language of the statute does not constitute a reorganization. There must be more than a mere acquisition of a majority of the outstanding shares; the transaction must result in some *real semblance to a merger or a consolidation.* Certainly the facts in the instant case cannot be so described. Here, the taxpayer received cash and well-secured mortgage bonds of a fair market value only slightly less than their par. The old corporation was not dissolved, but continued operation of its business without change in corporate structure, capitalization, or otherwise, and is still in existence.

In *Pinellas Ice Co.* v. *Commissioner, supra,* the taxpayer, a corporation, transferred its assets to

another corporation for cash and notes. In affirming the conclusion of the lower court that the transfer did not constitute a reorganization, the Supreme Court said (p. 469):

> The paragraph in question directs: "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation)." The words within the parenthesis may not be disregarded. They expand the meaning of "merger" or "consolidation" so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. But the mere purchase for money of the assets of one Company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes. This general view is adopted and well sustained in *Cortland Specialty Co.* v. *Commissioner of Internal Revenue,* 60 F. (2d) 937,

939, 940. It harmonizes with the underlying purpose of the provisions in respect of exemptions and gives some effect to all the words employed.

Likewise, in the *Cortland Specialty Co.* case, *supra,* the taxpayer, a corporation, transferred its assets to another corporation, for cash and promissory notes. Furthermore, it even agreed to and did dissolve. In denying the claimed exemption the Second Circuit Court of Appeals said (pp. 939–940):

> In subdivision (h) (1) (A) a reorganization is defined as *"a merger or consolidation"*, and the subdivision goes on to say that "merger or consolidation" *include* "the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation." If the last clause means that any transfer of "substantially all the properties" of one corporation to another corporation is a reorganization, the position of Cortland is strong; but we do not regard such an interpretation as warranted. * * * Reorganization is defined in subdivision (h) (1) (A) as including "a merger or consolidation." A merger ordinarily is an absorption by one corporation of the properties and franchises of another whose stock it has acquired. The merged corporation ceases to exist, and the merging corpora-

> tion alone survives. A consolidation involves a dissolution of the companies consolidating and a transfer of corporate assets and franchises to a new company. In each case interests of the stockholders and creditors of any company which disappears remain and are retained against the surviving or newly created company. * * * Undoubtedly such statutes vary in the different states particularly in respect to how far the constituent companies may be deemed to survive the creation of the new or modified corporate structure, but we believe that the general purpose of them all has been to continue the interests of those owning enterprises, which have been merged or consolidated, in another corporate form. * * * In defining "reorganization", section 203 of the Revenue Act gives the widest room for all kinds of changes in corporate structure, but does not abandon the primary requisite that there must be some continuity of interest on the part of the transferor corporation or its stockholders in order to secure exemption. Reorganization presupposes continuance of business under modified corporate forms.

This application and construction of the statute was expressly approved by the Supreme Court in the *Pinellas Ice Co.* case and, it is submitted, is conclusive upon the question presented here. The conclusion is inescapable that there must be some continuity of interest more substantial than that

represented by mere well-secured promissory notes or bonds. Such secured obligations to pay are the equivalent of cash and do not meet the requirement of the statute and Regulations (Article 1574, *infra*) that "stock or securities" must be received in the exchange.

Furthermore, it has been expressly held by the same Circuit Court of Appeals (Second), which decided the *Cortland Specialty Co.* case, that bonds of a corporation received in such an exchange are not "securities" within the requirement of the Act for a nontaxable exchange. In *Worcester Salt Co.* v. *Commissioner, supra,* the taxpayer had acquired from a wholly-owned subsidiary (Kerr-Remington Salt Co.) all of the latter's assets in exchange for $680,000 of bonds of the taxpayer. In denying the transaction constituted a statutory reorganization, the court said (p. 252):

> In *Pinellas Ice & Coal Storage Co.* v. *Com'r, supra,* the court pointed out that, to constitute a reorganization, the transaction must at least "partake of the nature of a merger or consolidation", and in *Cortland Specialty Co.* v. *Com'r, supra,* we defined a merger as an absorption by one corporation of the properties and franchises of another. The transaction in the instant case in no sense can be deemed to "partake of the nature of a merger or consolidation." The Kerr-Remington Salt Company had no interest in the petitioner because, like the notes in the Pinellas Case, bonds are merely an evi-

> dence of indebtedness and gave the Kerr-Remington Salt Company no interest in the petitioner itself. Continuity of interest is a requisite. *Cortland Specialty Co.* v. *Com'r, supra; Gregory* v. *Helvering, supra; C. H. Mead Coal Co.* v. *Com'r,* 72 F. (2d) 22 (C. C. A. 4).

Certainly, if in the transaction there between two affiliated corporations, with the purchasing corporation already owning the entire capital stock of the transferor, there may not be said to be such a continuity of interest by the ownership of bonds to satisfy the terms of the statute, far less may it be said here to constitute such an interest where the purchasing corporation acquired only a majority interest in the capital stock from certain stockholders with the transferor corporation retaining its own identity, assets, business, and corporate structure.

Even the receipt of preferred stock is insufficient to secure to the transferor that requisite of continuity of interest in the absence of other factors which would bring an exchange within the definition of a merger or consolidation. This was recently decided by the Seventh Circuit Court of Appeals in the case of *John A. Nelson Co.* v. *Commissioner, supra* (now pending on writ of certiorari in the Supreme Court of the United States, No. 61, October Term, 1935). There the taxpayer transferred substantially all its property (with the exception of $100,000 in cash) to another corpora-

tion in exchange for $2,000,000 in cash and 12,500 shares of (nonvoting) preferred stock of the purchasing corporation. Although the transaction came literally within the terms of Section 203 (h) (1) (a), and the parties to the transfer had stipulated that a reorganization under the statute had been effected, the court examined the transaction as a whole and denied the claimed exemption. The court said (p. 698):

> The controlling facts leading to this conclusion are that petitioner continued its corporate existence and its franchise and retained a portion of its assets; that it acquired no controlling interest in the corporation to which it delivered the greater portion of its assets; that there was no continuity of interest from the old corporation to the new; that the control of the property conveyed passed to a stranger, in the management of which petitioner retained no voice.
>
> It follows that the transaction was not part of a strict merger or consolidation or part of something that partakes of the nature of a merger or consolidation and has a real semblance to a merger or consolidation involving a continuance of essentially the same interests through a new modified corporate structure. Mere acquisition by one corporation of a majority of the stock or all the assets of another corporation does not of itself constitute a reorganization, where such acquisition takes the form of a

> purchase and sale and does not result in or bear some material resemblance to a merger or consolidation.

The construction and application of the pertinent provision of the statute by the Circuit Court of Appeals for the Tenth and Fourth Circuits, likewise support the decision of the Board in the instant case. Thus, in *Prairie Oil & Gas Co.* v. *Motter, supra,* the entire stock of Olean Petroleum Company was purchased from its stockholders for cash by Prairie Oil & Gas Company, and shortly thereafter Olean transferred all its property to Prairie Oil & Gas Company. Although the contention was made that the acquisition of the Olean stock and assets by Prairie constituted a reorganization, the Tenth Circuit Court of Appeals chose to view the transaction as a whole, and held that there was merely a sale of the assets.

To the same effect is the case of *West Texas Refining & Development Co., supra,* wherein a corporation transferred to another all its assets for cash and a 50 percent stock interest in the transferee. The same court held the transaction not a statutory reorganization and said (p. 80):

> The purpose of section 203, *supra,* was to relieve corporations from profits taxes in cases where there is only a change in corporate form without an actual realization of any gain from an exchange of properties. It is intended to apply to cases where a corporation in form transfers its property, but in

substance it or its stockholders retain the same or practically the same interest after the transfer. See *Cortland Specialty Co.* v. *Commissioner* (C. C. A. 2) 60 F. (2d) 937, 940; *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 287 U. S. 462, 53 S. Ct. 257, 77. L. Ed. 428; *Id.* (C. C. A. 5) 57 F. (2d) 188.

Similarly, in *C. H. Mead Coal Co.* v. *Commissioner, supra,* and *G. & K. Mfg. Co.* v. *Commissioner, supra,* the Fourth Circuit Court of Appeals gives recognition to the rule that in order to constitute a statutory reorganization the transaction must, in addition to meeting the literal requirement of the language of Section 203 (h) (1) (A), partake of the real nature of a merger or consolidation. In the *Mead Coal Co.* case, there was in fact a merger, or reorganization, with the stockholders of the old company obtaining stock in the new, with a consequent continuity of interest. In the later *G. & K. Mfg. Co.* case the same court held, upon a view of the whole transaction, that even though the selling corporation acquired stock in the purchaser in exchange for its own assets, the surrounding facts of the transaction were insufficient to show a merger or consolidation. Among the controlling facts, the court mentioned that the taxpayer remained in existence, possessed of a substantial amount of money, qualified to engage in active business in its own capacity or through its subsidiaries, and with the intent so to do, so far as the record shows. To a greater degree, in the instant case, the facts

reveal a continued business existence on the part of the transferor corporation, with merely a change in the ownership of the majority of its stock and no continuity of interest by its former stockholders.

Clearly, it is submitted, in the light of the foregoing authorities, the conclusion is inescapable that where one corporation merely purchases a majority stock interest in another corporation, in exchange for cash and bonds, with no continuity of interest on the part of the selling corporation, or its stockholders, and the transferor corporation retains its own assets and identity and continues to engage in active business, as theretofore, none of the elements of a merger or consolidation are present and the transaction is in no respect a reorganization within the meaning of the statute. Consequently, any gain realized by the taxpayer in a transaction of this kind is recognizable and may not be deferred for income-tax purposes.

It is well settled that a literal compliance alone with the pertinent provisions of the statute is insufficient to exempt the gain resulting from an exchange. *Gregory* v. *Helvering,* 293 U. S. 465. It is readily apparent from an examination of the foregoing decisions, that upon the facts in the instant case there is far less reason to construe the transaction here as a statutory reorganization than in the authorities relied upon.

The petitioner urges here that because of the reversal of the decisions of the Board of Tax Ap-

peals in the *Watts* and *Minnesota Tea Co.* cases the decision of the Board in the instant case must be unsound. The conclusion does not follow. The facts in the instant case are entirely unlike the cases relied upon by the petitioner and do not support the *rationale* of those decisions, which gave effect to the pertinent Treasury Regulations.

In the *Watts* case three stockholders transferred the entire capital stock of one corporation to another in exchange for *stocks* and bonds of the transferee. The Commissioner and the Board treated the stock so received by the transferors as cash and determined a deficiency upon that basis. The Circuit Court of Appeals reversed the Board and held a statutory reorganization had been effected under either subdivision (3) or (6) of Article 1574, Treasury Regulations 65, promulgated under the same provisions of the Revenue Act of 1924, and which in all essential respects are identical with Treasury Regulations 69, Article 1574, *infra*. The court, likewise, declared the Regulations referred to valid in the light of their legislative history.

It is manifest, however, from an examination of the language of the Regulations applied by the court that the corresponding article of the Regulations in effect under the Revenue Act of 1926 has no application in the present circumstances. The language of the Regulations declares a statutory reorganization to have been effected—

> If two or more corporations reorganize, for example, by—
>
> (3) The sale of the stock of B to A,
>
> (6) The acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or * * * then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is *stock or securities* of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is *stock or securities* of corporation A or B. (Italics supplied.)

Obviously, the taxpayer here cannot qualify under the proviso of the Regulations to subdivisions (3) or (6), nor under any other of the subdivisions included in the Regulations (see Article 1574, *infra*). All of the transactions described in this Article are conditioned upon the receipt of *stock or securities.*

If more light were needful as to the exact intent and scope of the *Watts* decision, it is supplied by the decision of the same court in the *Worcester Salt Co.* case, *supra,* decided two weeks earlier, wherein the court held that bonds, like notes, are merely an evidence of indebtedness and do not give the requisite continuity of interest. This construction of

the statute, of course, is consistent with the pertinent Regulations (Articles 1574, 1575, *infra*).

Likewise, the decision of the Eighth Circuit Court of Appeals in the *Minnesota Tea Co.* case is based upon an exchange whereby the transferor corporation received stock in the transferee. It was contended by the Commissioner that, under the circumstances there, a controlling interest (80 percent) was necessary, but this was denied by the court. The court, however, did recognize the necessity for a continuing interest, represented by *stock,* and said (p. 802):

> That requisite is found as an implication from the provisions of Section 112 (b) (3) and (b) (4) relative to the consideration consisting solely of stocks and securities. But those provisions are to be read in connection with Section 112 (d). No particular percentage of the stock of the transferee to be received by the transferor is specified or required. We find no ground for holding that the "continuance of interest" must be of essentially the same interest, or that it must be a controlling interest. The provision for percentage of stock to be received, specified in clause (B) reorganizations, has no application here.

The *Minnesota Tea Co.* and *Watts* cases are now pending upon writs of certiorari in the Supreme Court of the United States (Nos. 174, 184, 185, 186, respectively, October Term, 1935), but from the foregoing discussion, and an examination of those

decisions in the light of the Treasury Regulations applicable thereto, it plainly appears that the factual basis of those decisions (receipt of stock by the transferees) is lacking in the present case, and the rule applied has no application here.

Furthermore, the determination by the Commissioner and the decision of the Board of Tax Appeals in the instant case are in accordance with, and not contrary to, the applicable Regulations 69, Articles 1574 and 1575, *infra.* These Regulations do not define a reorganization as having been effected in the absence of continuity of interest represented by stock ownership and other factors partaking of a merger or consolidation. And, even if they so provided, the judicial construction of the statute is controlling (*Pinellas Ice Co.* v. *Commissioner,* and other above-cited cases), and the Regulations would be without effect. *Morrill* v. *Jones,* 106 U. S. 466, 467; *Burnet* v. *Chicago Portrait Co.,* 285 U. S. 1.

Clearly, it is submitted, the bonds received by the taxpayer are not "securities" within the meaning of the reorganization provisions of the Revenue Acts. *Worcester Salt Co.* v. *Commissioner, supra.* These bonds, like the promissory notes in the *Pinellas* and *Cortland Specialty Co.* cases, are mere evidence of indebtedness and an obligation to pay the purchase price of the stock. In the instant case they were issued for the specific purpose of making partial deferred payment on the

purchase price of the stock acquired from petitioner and other stockholders (R. 18, 43, 45).

A bond is primarily a promise to pay a sum of money. Black's Law Dictionary, 3d ed., p. 234; *Corbett* v. *Burnet,* 50 F. (2d) 492 (App. D. C.), certiorari denied, 284 U. S. 646; *Mendelson* v. *Realty Mortgage Corp.,* 257 Mich. 442, 241 N. W. 154, 155.

Section 203 (d) (1) directs that where other property or money is received in an exchange, in addition to the property (stocks or securities) permitted by other paragraphs of Section 203 to be received without the recognition of gain, the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property. Since the property permitted by the pertinent provisions of the statute to be received without recognition of gain consists of *stocks or securities only,* and bonds are neither stocks or securities within the meaning of those provisions, it follows that the gain upon them must be recognized under the statute to the extent of their fair market value.

Whether or not the transaction whereby the Southern California Gas Company acquired all the properties and business of the Midway Gas Company in exchange for its new issue of capital stock constitutes a statutory reorganization has no relation to the taxpayer's position here. Even if it were held that such a transaction was a reorganiza-

tion under section 203 (h) (1), the bonds of this taxpayer were not acquired from a party to that transaction. They were received from the Southern California Gas Corporation, the new Delaware corporation, which was not a party to the transaction between Old Southern and Midway. As heretofore pointed out, the transaction in which they were received was not one within the meaning of section 203 (h) (1) and the exemption granted by section 203 (b) (2) is not available to this taxpayer.

CONCLUSION

The decision of the Board is correct and should therefore be affirmed.

Respectfully submitted.

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OCTOBER 1935.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(d) (1) If an exchange would be within the provisions of paragraph (1), (2), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(h) (1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B)

a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. * * * (U. S. C. App., Title 26, Sec. 934.)

Treasury Regulations 69:

ART. 1574. *Exchanges in connection with corporate reorganizations.*—Since corporate reorganizations which result only in a change in form and which do not substantially affect the property interests, either of the shareholders or of the corporations, may be required or may be made desirable by business conditions, State laws, or other causes, the statute provides that no gain or loss shall be recognized if, in pursuance of a plan of reorganization, stock or securities in a corporation a party to a reorganization are exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization, or if, in pursuance of a reorganization plan, a corporation a party to a reorganization exchanges property solely for stock or securities in another corporation a party to the reorganization. If two or more corporations reorganize, for example, by—

(1) The dissolution of corporation B and the sale of its assets to corporation A,
(2) The sale of its property by B to A,
(3) The sale of the stock of B to A,
(4) The merger of B into A,
(5) The consolidation of A and B,
(6) The acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or
(7) The transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B,
then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock or securities of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B.

Furthermore, if the reorganization is accomplished by the transfer by corporation A of a portion of its assets to corporation B in exchange for the stock of corporation B, and corporation A distributes to its shareholders the stock of corporation B, no taxable income is realized by the shareholders from the receipt of such stock. (See article 1576.)

In conformity with the principles of ignoring for tax purposes those reorganizations which result merely in a change in form, the statute provides further that the stock received by the shareholders in connection with the reorganization shall have the same basis for the purpose of determining gain or loss

from its subsequent sale as the stock surrendered by them, and that the assets acquired by a corporation a party to the reorganization shall have the same basis for determining depletion, exhaustion, wear and tear, obsolescence, and gain or loss from subsequent sale as they had in the hands of the corporation from which they were acquired. (See articles 1596–1598.)

Adequate provision is made in the statute for cases in which income is actually realized by the shareholders in connection with the reorganization through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See article 1575.) While placing no obstacle in the way of genuine reorganizations, the statute does not allow the use of reorganizations to avoid the tax.

Records in substantial form, showing the basis of the stock or property exchanged, and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock or property received or exchanged.

ART. 1575. *Exchanges in reorganization for stock or securities and other property or money.*—If stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchange for stock or securities in such corporation or in another corporation a party to the reorganization and other property or money, the gain, if any, to the recipient will be recognized in an amount not in excess of the sum of the money and the fair market value of the other property. No loss from such an exchange will be recognized, however. (See section 203 (f).) If a distribution of property or money in the course of

a reorganization is otherwise within the provisions of this paragraph, but has the effect of the distribution of a taxable dividend, there shall be taxed to each distributee (1) as a dividend, such an amount of the gain recognized under this paragraph as is not in excess of the distributee's ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913, and (2) as a gain from the exchange of property, the remainder of the gain recognized under this paragraph.

Examples.—(1) A, in connection with a reorganization, exchanges in 1925 a share of stock in the X company, purchased in 1918 for $100, for (*a*) a share of stock in the Y company a party to the reorganization, which has a fair market value of $90, and (*b*) $20 cash. The gain from the transaction, $10, is recognized and taxed to A. See article 1596 for the basis for determining gain or loss from a subsequent sale.

(2) The X corporation has a capital of $100,000 and earnings and profits of $50,000 accumulated since February 28, 1913. The X corporation in 1925 transfers all its assets to the Y corporation in exchange for the issuance of all Y's stock and the payment of $50,000 in cash to the shareholders of corporation X. A, who owns one share of stock in X, for which he paid $100, receives a share of stock in Y worth $100 and in addition $50 in cash. A will be liable to the surtax on $50.

If, in pursuance of a plan of reorganization, property is exchanged by a corporation a party to a reorganization for stock or securities in another corporation a party to the reorganization and other property or money, then, if the other property or money received by the corporation is distributed by

it pursuant to the plan of reorganization, no gain to the corporation will be recognized. If the other property or money received by the corporation is not distributed by it pursuant to the plan of reorganization, the gain, if any, to the corporation from the exchange will be recognized in an amount not in excess of the sum of money and the fair market value of the other property so received which is not distributed. In either case no loss from the exchange will be recognized. (See section 203 (f).)

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